Supreme Court, U.S.
FILED
NOV 22 1999
OFFICE OF THE CLERK

No. 98-9828

In The

Supreme Court of the United States

MARIA SUZUKI OHLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

BENJAMIN L. COLEMAN*
GARY P. BURCHAM
MARIO G. CONTE
FEDERAL DEFENDERS OF
SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467
Counsel for Petitioner

**Counsel of Record*

SETH P. WAXMAN*
Solicitor General
Department of Justice
Washington, D.C.
20530-0001
Telephone: (202) 514-2217
Counsel for Respondent

Petition For Certiorari Filed June 7, 1999
Certiorari Granted October 18, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

158 P

TABLE OF CONTENTS

	Page
Docket Entries	1
Indictment	4
Government's Motions *In Limine* – 1/13/98	6
Petitioner's Opposition To Government's Motions *In Limine* – 1/20/98	24
In Limine Hearing – 1/26/98	42
Petitioner's Supplemental *In Limine* Brief – 1/27/98	74
Government's Supplemental *In Limine* Brief – 1/27/98	80
Trial – 1/28/98	87
Trial – 1/29/98	99
Judgment	140
Opinion Of The Ninth Circuit	146
Order From The Court Granting Petition For Writ Of Certiorari And Leave To Proceed In Forma Pauperis	156

DOCKET ENTRIES

DATE		PROCEEDINGS
11/10/97	22	Minutes: Enter Order by Judge Jeffrey T. Miller Motion hearing held: Pending Motions and Motions in limine set for 1/26/98 at 2:00 p.m.; jury trial set for 9:00 1/27/98 for Maria Suzuki Ohler granting motion grant leave to file further motions [13-2]; granting motion for reciprocal discovery [16-1] Court Reporter: Carolyn Martin (cg) [Entry date 11/12/97]
1/13/98	23	MOTIONS IN LIMINE RE expert testimony, impeachment evidence, 404(b) evidence, demeanor of evidence, character evidence, and booking information by USA as to Maria Suzuki Ohler assigned to Judge Jeffrey T. Miller motion hrg set for 1/26/98 at 2:00 p.m. t/w prf svc (cg) [Entry date 01/13/98]
1/20/98	24	Notice of Motions in Limine and MOTIONS IN LIMINE to prevent the testimony of agents re drug courier profile, to exclude the indictment from the jury room during deliberations, for attorney voir dire by Maria Suzuki Ohler assigned to Judge Jeffrey T. Miller motion hrg set for 1/26/98 at 2:00 p.m. (cg) [Entry date 1/22/98]
1/20/98	24	Opposition by defendant Maria Suzuki Ohler to the govt's in limine motions [23-1], to [23-2], to [23-3], to [23-4], to 23-5], to [23-6] (cg) [Entry date 01/22/98]

1/20/98	25	Stmt of Facts and Memorandum of P/a's defendant Maria Suzuki Ohler in support of motions in limine to prevent the testimony of agents re drug courier profile [24-1], to exclude the indictment from the jury room during deliberations [24-2], and for atty conducted voir dire [24-3] t/w exhibits (cg) [Entry date 01/22/98]
1/26/98	27	Minutes: Enter Order by Judge Jeffrey T. Miller: Motions Hearing and Motions in Limine held. Denying dft's motion to prevent the testimony of agents re drug courier profile [24-1], granting dft's motion to exclude the indictment from the jury room during deliberations [24-2], granting dft's motion for attorney voir dire [24-3]. Granting the govt's motion testimony [23-1], denying in part and granting in part the govt's motion 404(b) evidence [23-3], granting the govt's demeanor of evidence [23-4], granting the govt's motion booking information [23-6] The govt's Motion for impeachment evidence – further briefing to be filed on 1/27/98. Pending motions hearing cont to 9:00 on 1/28/98 for Maria Suzuki Ohler; jury trial reset for 9:00 1/28/98 for Maria Suzuki Ohler Court Reporter: Debra Henson (cg) [Entry date 01/28/98]
1/27/98	29	Supplemental Briefing by defendant Maria Suzuki Ohler in opposition to in limine motion [23-2] re impeachment evidence t/w prf svc (cg) [Entry date 01/29/98]
1/27/98	30	Supplemental Briefing by plaintiff USA in support of in limine motion re use of dft;s

		[sic] prior drug conviction for impeachment evidence [23-5] (cg) [Entry date 01/29/98]
1/28/98	–	Jury Trial Began 1st day of jury trial – Voir dire begins as to Maria Suzuki Ohler, Jury impaneled as to Maria Suzuki Ohler, jury trial cont to 9:00 1/29/98 for Maria Suzuki Ohler Motions ruled on – Discovery – granted; Further Motions – granted; Govt's motion for reciprocal discovery – granted; In Limine Motion re impeachment evidence – denied; Govt's Motion in Limine re character evidence – denied. Court reporter: Debra Henson (cg) [Entry date 01/30/98] [Edit date 01/30/98]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

April 1997 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. MARIA SUZUKI OHLER, Defendant.	Criminal Case No. '97 cr 2278JM INDICTMENT Title 21, U.S.C., Secs. 952 and 960 – Importation of Marijuana; Title 21, U.S.C., Sec. 841(a)(1) – Possession of Marijuana with Intent to Distribute (Filed Aug. 6, 1997)

The Grand jury charges:

Count 1

On or about July 29, 1997, within the Southern District of California, defendant MARIA SUZUKI OHLER did knowingly and intentionally import approximately 37.23 kilograms (approximately 81.90 pounds) of marijuana, a Schedule I Controlled Substance, into the United States from a place outside thereof; in violation of Title 21, United States Code, Sections 952 and 960.

Count 2

On or about July 29, 1997, within the Southern District of California, defendant MARIA SUZUKI OHLER did knowingly and intentionally possess, with intent to

distribute, approximately 37.23 kilograms (approximately 81.90 pounds) of marijuana, a Schedule I Controlling Substance; in violation of Title 21, United States Code, Section 841(a)(1).

DATED: August 6, 1997.

A TRUE BILL:

_____

Foreperson

ALAN D. BERSIN
United States Attorney

By: _____
MICHAEL J. PEREZ
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

GOVERNMENT'S MOTIONS
IN LIMINE REGARDING:

(1) EXPERT TESTIMONY;
(2) IMPEACHMENT EVIDENCE;
(3) 404 (B) EVIDENCE;
(4) DEMEANOR OF EVIDENCE;
(5) CHARACTER EVIDENCE;
(6) BOOKING INFORMATION.

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Alan D. Bersin, United States Attorney, and Michael F. Kaplan, Special Assistant United States Attorney, and files the attached motions *in limine*.

I

STATEMENT OF FACTS

On July 29, 1997, at approximately 7:15 a.m., Maria Suzuki-Ohler (hereinafter "defendant") attempted to make entry into the United States from the Republic of Mexico via the San Ysidro, California, Port of Entry. The defendant was the driver and the sole occupant of a 1984 GMC van bearing California license plates 2K88304.

During a preprimary inspection, a Customs Inspector asked the defendant for the registration of the vehicle she was driving. The registration indicated the defendant was the owner of the vehicle. When asked, she stated that she spent the night in Tijuana and was not bringing anything back from Mexico. While inspecting the rear area of the

van, the Customs Inspector noticed signs that someone had tampered with the interior panel. When the Customs Inspector probed the panel, he initially felt resistance. As he continued to probe with a screwdriver, he felt the screwdriver puncture something behind the paneling.

At that time, the narcotic detection dog, "Salem," alerted to the panels on the left side of the vehicle and began scratching vigorously.

During a secondary inspection, 27 packages were found behind the inside panels of the van. A sample of one of the packages field tested positive for marijuana. The total weight of the packages was 81.9 pounds.

The defendant was then advised of her rights per *Miranda*. The defendant elected to exercise her rights and requested an attorney.

II

MOTIONS IN LIMINE

A. EXPERT TESTIMONY

If specialized knowledge will assist the trier-of-fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. It is within the sound discretion of the trial judge to determine whether or not expert testimony would assist in understanding the facts at issue. *United States v. Alonso*, 48 F.3d 1536, 1539 (9th Cir. 1995); *United States v. Lennick*, 18 F.3d 814, 821 (9th Cir. 1994). An expert's opinion may be based on hearsay or facts not in evidence where the facts or data relied upon are of the type reasonably relied

upon by experts in the field. Fed. R. Evid. 703. An expert may provide opinion testimony even if it embraces an ultimate issue to be decided by the trier-of-fact. Fed. R. Evid. 704.

1. Value of Drugs

In this case, the Government will use a narcotics expert to testify as to the wholesale value of the marijuana involved in this case. This testimony is relevant because the value circumstantially shows that the defendant knew marijuana was in the vehicle she was driving when arrested.

The Government also intends to present expert testimony regarding the retail value of the marijuana seized. The Ninth Circuit has previously upheld the admissibility of such expert testimony. In *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir. 1994), defendant was charged with the importation of heroin after he and others attempted to smuggle approximately 2.5 pounds of heroin across the border at the San Ysidro Port of Entry. At trial, the Government introduced the expert testimony of a DEA agent as to the street value of the heroin, assuming it had been repeatedly cut and sold on the street. Upon conviction, defendant appealed the admission of such testimony. The Ninth Circuit held that DEA agents can testify to the street value of narcotics and counsel can argue reasonable inferences from it. *Ogbuehi*, 18 F.3d at 812.

Here, as in *Ogbuehi*, testimony as to the wholesale and street value of the marijuana is relevant to defendant's knowledge and intent, and should be admitted. *See*

also, United States v. Kearney, 560 F.2d 1358, 1369 (9th Cir. 1977) (street value of narcotics relevant to defendants' knowledge of the presence of drugs); *United States v. Savinovich*, 845 F.2d 834, 838 (9th Cir. 1988) (price, quantity and quality of narcotics is relevant to defendant's intent to distribute); *United States v. Golden*, 532 F.2d 1244, 1247-1248 (9th Cir. 1987) (the price of heroin in the relevant market is admissible).

2. Evidence Regarding The Structure Of Drug Organizations

The Government intends to present expert testimony regarding generic information as to the structure of marijuana drug operations, the division of labor, drug smuggling techniques, and what constitutes a personal use amount. This testimony is proper to help the jury understand the evidence in the case and to insure that they do not decide the case in a vacuum.

This is precisely the type of evidence approved of by the Ninth Circuit in *United States v. Patterson*, 819 F.2d 1495 (9th Cir. 1987). In *Patterson*, the court permitted expert testimony that members of narcotic rings play many different roles, including street salesmen, money collectors, and lookouts. *Id.*, at 1507. Similarly, in *United States v. Maher*, the court allowed expert testimony that a defendant's actions were consistent with the modus operandi of persons transporting drugs. 645 F.2d 780, 783 (9th Cir. 1981) (per curiam). *See also United States v. Gil*, 58 F.3d 1414, 1421-1422 (9th Cir.) (permitting expert testimony as to general practice of drug traffickers to establish defendants' modus operandi).

Such expert testimony also "alerts [the jury] to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." *United States v. Johnson*, 735 F.2d 1200, 1202 (9th Cir. 1984). There are numerous cases allowing the admission of expert testimony in similar circumstances. *United States v. Taren-Palma*, 997 F.2d 525, 534 (9th Cir. 1993) (upholding expert testimony regarding the use of guns in narcotic transactions); *United States v. Gutierrez*, 995 F.2d 169, 172 (9th Cir. 1993) (permitting officers to testify that "bending, shifting, twisting, shadow, and hand moving" were "furtive" behavior by car occupants); *United States v. Bosch*, 951 F.2d 1546, 1549 (9th Cir. 1992) (IRS expert could testify that in his opinion, defendant's activities had aided and abetted the distribution of cocaine); *United States v. Jaramillo-Suarez*, 950 F.2d 1378, 1384 (9th Cir. 1991) (expert properly testified regarding drug organization's use of pay/owe sheets to keep track of customers); *United States v. Guzman*, 8439 [sic] F.2d 447 (9th Cir. 1988) (admitting expert agent's testimony that car switch is common maneuver used by narcotics traffickers); *United States v. Kinsey*, 843 F.2d 383 (9th Cir. 1988) (experts testimony about practice of drug traffickers to use women as decoys and to have load vehicle followed by person truly responsible).

Indeed, an experienced narcotics agent may testify in the form of an opinion even if that opinion is based in part on information from other agents familiar with the issue. *United States v. Golden*, 532 F.2d 1244, 1248 (9th Cir. 1976), *cert. denied*, 429 U.S. 842 (1976).

3. "Blind Mule" Testimony

Expert testimony as to whether drug traffickers are likely to entrust a valuable cargo of drugs to an unknowing courier has been specifically approved in the recent Ninth Circuit decision in *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997). In *Cordoba*, an expert witness testified that drug traffickers do not entrust a large amount of drugs to someone who doesn't know what he is transporting. On appeal, the Ninth Circuit found no error in allowing this testimony, stating that "expert testimony that drug traffickers do not use unknowing transporters was clearly probative of Cordoba's knowledge that he possessed drugs." As the Court in *Cordoba* correctly determined, testimony of this nature from a properly qualified narcotics agent is helpful to the jury in understanding the evidence or in determining an issue, the standard for admissibility under Federal Rule of Evidence 702. Such expert testimony should not be kept from the jury – which can give such testimony as little or as much weight as it deems appropriate. *See also, United States v. Morales*, ___ F.3d ___, No. 94-10507 (*en banc*), (9th Cir. March 5, 1997) (Expert may testify even if jury might infer *mens rea* from testimony).

The type of testimony admitted in *Cordoba* has been approved of in other Ninth Circuit cases. In *United States v. Castro*, 972 F.2d 1107 (9th Cir. 1992), the Ninth Circuit cited, as evidence sustaining the conviction of a defendant for cocaine possession, expert testimony that traffickers would never have entrusted a large amount of cocaine to "an unknowing dupe." *Id.* at 111.

Finally, Courts of Appeal in other Circuits have upheld the admissibility of just the sort of testimony approved of in *Cardoba, Castro* and *Lockhart*. In *United States v. Willis*, 61 F.3d 526 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 2528 (1995), the Seventh Circuit upheld the admissibility of testimony from a Drug Enforcement Agency agent that he had never arrested an individual or participated in a drug transportation case where the courier did not know what he was transporting. *Id.* at 533-34. Similarly, in *United States v. Richard*, 969 F.2d 849 (10th Cir. 1992), the Tenth Circuit upheld the admissibility of the testimony of a police officer that, based upon his experience, drug dealers will not invite others to participate in a large narcotics transaction who are not aware of the nature of the transaction. *Id.* at 855.

In this case, the defendant was arrested while driving a vehicle containing approximately 81.9 pounds of marijuana across the border into the United States (one of the most critical points in the chain of distribution). This marijuana has an approximate wholesale value of $41,000 and an approximate street value of $78,000. Under *Cordoba*, and the other cases cited above, testimony that drug traffickers would not entrust a valuable cargo of drugs such as this to an unknowing courier is clearly relevant, admissible and probative as to whether the defendant here had knowledge that she possessed drugs.

The Government does not intend to introduce "drug courier profile" evidence, as that term is properly defined under Ninth Circuit case law. However, even though such testimony is generally precluded, the Ninth Circuit recognizes an exception where the defendant "opens the door" to such testimony. *United States v. Lim*, 984 F.2d 331, 335

(9th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2944 (1993); *United States v. Baron*, ___ F.3d ___, 96 D.A.R. 10815 (9th Cir. Sept. 4, 1996). That door may be opened through the defendant's cross-examination of the Government's witness, *United States v. Beltran-Rios*, 878 F.2d 1208, 1210-13 (9th Cir. 1989); *United States v. Taylor*, 716 F.2d 701, 710 (9th Cir. 1983), or the defense introduction of negative profile testimony, i.e., evidence suggesting that the defendant possesses certain characteristics inconsistent with an inference of guilt. *United States v. Sotelo-Murillo*, 887 F.2d 176, 183 (9th Cir. 1989).

B. IMPEACHMENT EVIDENCE

The Government hereby notifies Defendant of its intention to offer the following conviction at trial under Federal Rule of Evidence 609(a)(1): Defendant was convicted of the felony offense of Possession of a Controlled Substance, in violation of California Health and Safety Code Section 11377(A), on June 29, 1993, and sentenced to 90 days jail and three years probation. Therefore, if Defendant testifies, the Government intends to use this conviction to impeach her.

Rule 609 provides that evidence of prior felony convictions is admissible for the purpose of attacking the credibility of a witness if the prejudicial effect of the evidence is outweighed by its probative value. Rule 609 provides:

> For the purpose of attacking the credibility of a witness, . . . evidence that an accused has been convicted of a crime (punishable by death or imprisonment in excess of one year) shall be

> admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. . . . evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement . . .

Fed. R. Evid. 609(a)(1).

In this case, it is anticipated that Defendant will claim that she was simply an unwitting driver who had no idea that the van she drove across the border contained narcotics. Thus her credibility is squarely at issue. The Government should not be prevented from demonstrating Defendant's lack of trustworthiness. *See United States v. Cook*, 608 F.2d 1175, 1187 (9th Cir. 1979) (*en banc*), *cert. denied*, 444 U.S. 1034 (1980), *overruled on other grounds, Luce v. United States*, 469 U.S. 38 (1984) (holding that the Government should not be prevented from providing information to the jury that undercuts defendant's trustworthiness). Thus, evidence of her prior felony conviction should be available for use by the Government to impeach Defendant should she choose to testify at trial.

Additionally, the Government intends to impeach the defendant, should she decide to testify, with evidence that she lied to pretrial services during her initial visit on August 8, 1997. Evidence that the defendant has previously lied in connection with this case is permissible impeachment evidence under Fed.R.Evid. 608(b) which provides in pertinent part:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may . . . if probative of truthfulness or untruthfulness, be inquired into

> on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . .

Fed.R.Evid. 608(b).

During defendant's initial visit with pretrial services, she informed Jeff Larsen, her pretrial services officer, that she had not used any drugs since completing drug rehabilitation in 1995. However, during pretrial release and subsequent to her initial visit to pretrial services, the defendant tested positive for methamphetamine on two separate occasions. Additionally, the defendant admitted before Magistrate Judge Aaron to testing positive for methamphetamine.

Therefore, should defendant elect to testify, questioning regarding her statement to pretrial services regarding her drug use should be permissible on cross-examination as evidence of untruthful character.

C. 404(b) EVIDENCE

Under Fed.R.Evid. 404(b), evidence of other crimes, wrongs, or acts is admissible if relevant to "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Rule 404(b) is a rule "of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove *only* criminal disposition." *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977) (emphasis in original). *Accord United States v. Ayers*, 924 F.2d 1468, 1472 (9th Cir. 1991); *Heath v. Cast*, 813 F.2d 254, 259 (9th Cir.); *United States v. Herrell*, 588 F.2d 711, 714

(9th Cir. 1978); *United States v. Sangrey*, 586 F.2d 1312, 1314 (9th Cir. 1978); *United States v. Riggins*, 539 F.2d 682, 683 (9th Cir. 1976). Indeed, Congress was not nearly so concerned with the prejudicial effect of Rule 404(b) evidence as it was with insuring "that restrictions would not be placed on the admission of such evidence." *United States v. Huddleston*, 485 U.S. 681, 688-89 (1988). Rule 404(b) therefore bars the introduction of evidence concerning prior criminal conduct or other bad acts by the defendant *only* if offered for the purpose of proving the defendant's bad character and implying that he acted in accordance with that bad character in the instant case.

In this case, the Government intends to introduce evidence of defendant's methamphetamine use to show her motive for smuggling marijuana, to obtain money to support her drug habit. Additionally, evidence of her prior felony drug conviction demonstrates that she had knowledge of the marijuana concealed in her van.

The admissibility of evidence under Rule 404(b) is evaluated using a four-part test. First, the evidence must tend to prove a material point at issue. Second, it must not be too remote in time. Third, the proof must be sufficient to support a finding that the defendant committed the other act. Fourth, in some cases, the prior act must be similar to the offense charged. However, the Ninth Circuit has generally ruled that similarity is not required if the defendant's knowledge is the issue. *United States v. Santa-Cruz*, 48 F.3d 1118, 1119 (9th Cir. 1995); *United States v. Corona*, 34 F.3d 876, 881 (9th Cir. 1994); *United States v. Arambula-Ruiz*, 987 F.2d 599, 603 (9th Cir. 1993). If these elements are satisfied, the court must then balance the probative value of the evidence against any prejudicial

effect. *United States v. Rude*, 88 F.3d 1538, 1549 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 690 (1997); *Corona*, 34 F.3d at 881; *United States v. Spillone*, 879 F.2d 514, 519 (9th Cir. 1989). Here the Government's evidence meets all elements of the test, and the prejudicial effect of the evidence does not substantially outweigh its probative value.

Evidence of the defendant's methamphetamine use is relevant to proving she had a motive for smuggling marijuana, to obtain money to support her habit, and the intent to distribute the marijuana. On August 8, 1997, the defendant reported to pretrial services as directed by Magistrate Judge Aaron. She informed pretrial services officer Jeff Larsen that prior to 1995, she used methamphetamine approximately two to three times per week. In 1995, according to the defendant, she received treatment for her habit, and since that time, has not used any drugs. However, while on pretrial release and subsequent to that discussion with Jeff Larsen, the defendant tested positive on two occasions for methamphetamine. Additionally, on October 7, 1997, in a hearing before Magistrate Judge Aaron, the defendant admitted to charges in an Order to Show Cause that she tested positive for methamphetamine.

Evidence of defendant's methamphetamine habit supports the reasonable inference that her motive for smuggling 81.9 pounds of marijuana was to obtain money to support her drug habit. Additionally, such evidence supports the inference that in order to obtain money for her smuggling activity, the defendant must first deliver the marijuana to another person(s). Both defendant's knowledge and intent to deliver the drugs are material to

this case and satisfy the first prong of the 404(b) test as outlined above. Reasoning along this same line, the Ninth Circuit has permitted the use of evidence of a defendant's heroin habit to demonstrate his motive to commit a bank robbery, *e.g., United States v. Miranda,* 986 F.2d 1283, 1285 (9th Cir.), *cert. denied,* ___ US. ___, 113 S.Ct. 2393 (1993), and the use of evidence of a defendant's cocaine trafficking activities to show his motive for concealing money and failing to file a currency report. *United States v. Conners,* 825 F.2d 1384 (9th Cir. 1987).

With respect to the admissibility of defendant's prior felony drug conviction, the Ninth Circuit has "consistently held that evidence of a defendant's prior possession or sale of narcotics is relevant under 404(b) to the issue of intent, knowledge, motive, opportunity, and absence of mistake or accident in prosecutions for possession of, importation of, and intent to distribute narcotics." *United States v. Mehrmanesh,* 689 F.2d 822, 832 (9th Cir. 1982). In *United States v. Rocha,* 553 F.2d 615, 616 (9th Cir. 1977), the court held, "[a]ppellant's possession of marijuana in the prior case clearly tended to show that he knew about marijuana in the present case and had illegal intent." Such a prior conviction is "highly probative as to knowledge and intent." *United States v. Sigal,* 572 F.2d 1320, 1323 (9th Cir. 1978). *See also, United States v. Robertson,* 15 F.3d 862, 871 (9th Cir. 1994) (stating evidence of a defendant's prior drug possession is "relevant and admissible to establish his intent to distribute.").

The second requirement, that the previous conduct not be to [sic] remote in time, is easily met here. During defendant's pretrial release, she tested positive for methamphetamine on two occasions, August 8, 1997, and

August 12, 1997, and admitted to this violation of pretrial release on October 7, 1997. With respect to defendant's conviction for possession of a controlled substance, she was convicted on June 29, 1993, well within the 10 year time period provided for in Fed. Rule Evid. 609(b). *See United States v. Rude,* 88 F.3d 1538, 1550 (eight years not too remote); *United States v. Ono,* 918 F.2d 1462, 1465 n. (9th Cir. 1990) (seven-year-old conviction admissible); *United States v. Ross,* 886 F.2d 264, 267 (9th Cir. 1989) (thirteen-year-old conviction admissible); *Spillone,* 879 F.2d at 518 (seventeen years not too remote).

The evidence also satisfies the third requirement, that it be sufficient to support a finding that the defendant committed the prior act. On August 8, 1997, as previously noted, the defendant reported to pretrial services as directed by the court. At that time, she informed pretrial services that she had an illicit history of drug use. This, in addition to her admission to testing positive for methamphetamine during pretrial release, provides ample evidence that she has a drug habit. In addition, with regard to defendant's 1993 conviction for possession of a controlled substance, the Government will provide a certified copy of the judgement and commitment order. As discussed above, because the primary issue at bar is whether the defendant knew there was marijuana in her van when she crossed the border at San Ysidro, it is not necessary for the United States to establish that her previous act of possession of a controlled substance is factually similar to the charged conduct.

Finally, although admissible under Rule 404(b), evidence of the defendant's methamphetamine use and felony drug conviction must still satisfy the Fed.R.Evid. 403

balancing test. The balancing of probative value versus unfair prejudicial effect is, of course, committed to the discretion of the Court. *E.g., United States v. Multi-Management, Inc.*, 743 F.2d 1359, 1364 (9th Cir. 1984). Nonetheless, the evidence should be excluded only if "the effect on the jury of the non-probative aspect of the evidence is likely to be *substantially greater* than the effect of the probative aspect . . . " *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982) (emphasis added). The non-probative aspect of the evidence is that aspect which makes conviction more likely because it provokes an emotional response in the jury. *Id.*

The evidence of defendant's drug use is highly probative of the defendant's guilt. The evidence demonstrates motive, intent, and knowledge. When viewed in the light of human experience, it is more probable that a person with a motive to commit a crime will commit that crime. In establishing the defendant's motive for smuggling marijuana, the evidence undoubtedly prejudices the defendant, but "evidence relevant to a defendant's motive 'is not rendered inadmissible because it is of a highly prejudicial nature . . . The best evidence often is.' " *United States v. Parker*, 549 F.2d 1217, 1222 (9th Cir.), *cert. denied*, 430 U.S. 971 (1977) (quoting *United States v. Mahler*, 452 F.2d 547, 548 (9th Cir. 1971), *cert. denied*, 405 U.S. 1069 (1972)). Rule 403 proscribes only *unfair* prejudice, *e.g., United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989), and the Court can prevent any *unfair* prejudice with a limiting instruction. *E.g., United States v. Manning*, 56 F.3d 1188 (9th Cir. 1995) (emphasis added).

For the reasons previously stated, evidence of defendant's felony drug conviction and drug use show her motive for smuggling, her knowledge of the marijuana concealed in her van, and her intent to deliver the marijuana to another person(s). Therefore, pursuant to Fed.R.Evid. 404(b), this evidence is admissible.

D. DEMEANOR EVIDENCE ADMISSIBLE

Evidence regarding defendant's demeanor and physical appearance is admissible as circumstantial evidence helpful to the jury's determination as to whether or not the defendant knew that drugs were concealed in the car. Fed. R. Evid. 701; *United States v. Mastberg*, 503 F.2d 465, 470 (9th Cir. 1974) (Government agents could properly testify as to defendant's nervousness). Here, Government agents had the opportunity to watch defendant as they asked her questions and informed her of facts relating to the offenses charged. Since these agents have personal knowledge, the evidence is admissible under Rule 602. In *United States v. Lui*, 941 F.2d 844, 848 (9th Cir. 1991), the Ninth Circuit concluded that defendant's actions both before and after the discovery of the drugs supported a finding of guilt. These actions included "acting disinterested and not helping in the search" and, when the inspector found the drugs, defendant "stepped away without attempting to see to what the inspector was referring. . . . " *Id.* at 848, n.2. Lastly, if Government agents testify regarding a defendant's demeanor, that defendant will have an opportunity to confront and cross-examine the agents as guaranteed by the Sixth

Amendment to the United States Constitution. Thus, testimony regarding defendant's demeanor and physical appearance is admissible.

E. IMPROPER CHARACTER EVIDENCE

The defendant may properly present character evidence as to defendant's general reputation as a law-abiding individual. However, the defendant may *not* introduce evidence of specific instances of good conduct. This distinction is clearly set out in Federal Rule of Evidence 405 and the cases interpreting it. *See* Rule 405(a); *See also Michelson v. United States*, 335 U.S. 469, 477 (1948) (character evidence may not include personal observations or knowledge, nor testimony as to defendant's specific acts or courses of conduct); *United States v. Hedgcorth*, 873 F.2d 1307 (9th Cir. 1989) (improper to allow defendant to offer evidence of specific acts to show character of law abidingness or patriotism).[1]

The only reason defendant seeks to introduce this evidence is to unfairly taint the jury. The defendant should not be allowed this opportunity.

---

[1] Evidence of specific acts as proof of character is allowed under Federal Rule of Evidence 405(b) only where character in the strict sense is at issue in a case. *See, e.g., United States v. Webster*, 649 F.2d 346 (5th Cir. 1981) (specific instances of conduct regarding predisposition where defense was entrapment).

F. ROUTINE BOOKING INFORMATION ADMISSIBLE

In this case, Customs Officials asked the defendant routine booking questions for the purpose of obtaining background information. The questions asked were standard background questions designed to complete a personal history and intake report. The United States Supreme Court has held that routine booking questions reasonably related to law enforcement record keeping concerns are not testimony and are therefore outside the Fifth Amendment privilege the *Miranda* is designed to protect. *Pennsylvania v. Muniz*, 496 U.S. 582, 600-602 (1990). Therefore, defendant's responses to agent's routine booking questions are admissible. *See United States v. Perez*, 776 F.2d 797, 799 (9th Cir. 1985).

III

CONCLUSION

For the foregoing reasons, the Government's motions *in limine* should be granted.

DATED: January 13, 1998.

Respectfully submitted,

ALAN D. BERSIN
United States Attorney

/s/ Michael F. Kaplan
MICHAEL F. KAPLAN
Special Assistant
U.S. Attorney

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

NOTICE OF MOTIONS *IN LIMINE* AND MOTIONS *IN LIMINE* TO:

1) PREVENT THE TESTIMONY OF AGENTS REGARDING DRUG COURIER PROFILE;

2) EXCLUDE THE INDICTMENT FROM THE JURY ROOM DURING DELIBERATIONS;

3) FOR ATTORNEY CONDUCTED VOIR DIRE, and OPPOSITION TO THE GOVERNMENT'S MOTIONS IN LIMINE

TO: ALAN D. BERSIN, UNITED STATES ATTORNEY, AND MICHAEL KAPLAN, SPECIAL ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on January 26, 1998, at 2:00 p.m., or as soon thereafter as counsel may be heard, the accused, Maria Ohler, by and through her counsel, S. Todd Neal and Federal Defenders of San Diego, Inc., will hereby move this Court to grant the above-entitled motions.

MOTIONS

The accused, Maria Ohler, by and through her attorneys, S. Todd Neal and Federal Defenders of San Diego,

Inc., hereby files the attached motions *in limine* of facts and law relating to this case. They are as follows:

1) prevent the testimony of agents regarding drug courier profile;

2) exclude the Indictment from the jury room during deliberations;

3) attorney conducted *voir dire*.

In addition, these motions contain Ms. Ohler's response and opposition to Motions In Limine #1-6 filed by the government. These motions are based upon the attached statement of facts and memorandum of points and authorities, the files and records in the above-captioned matter, and any and all other evidence brought before this Court before or during the hearing on these motions.

Respectfully submitted,

Dated: January 20, 1998

/s/ S. Todd Neal
S. TODD NEAL
Federal Defenders of
San Diego, Inc.
Attorneys for Ms. Ohler

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

STATEMENT OF FACTS AND MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS IN LIMINE

I.

STATEMENT OF FACTS

Ms. Ohler hereby incorporates by reference the Statement of Facts contained in her motions filed on September 22, 1997.

II.

EXPERT TESTIMONY FROM THE AGENTS REGARDING "DRUG COURIER PROFILE" SHOULD NOT BE ALLOWED

The government should be precluded from presenting opinion evidence from agents regarding the "drug courier profile." The Federal Rules of Evidence, specifically Rule 702, allows the admission of opinion evidence if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . and the witness is qualified as an expert" (emphasis added). The Supreme Court has defined drug courier profile as "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics." *Reid v. Georgia*, 448 U.S. 438, 440 (1979) (*per curiam*).

Although such profiles may be used as the basis for investigatory stops, *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581-1586 (1989), that, in and of itself, does not mean that such profile evidence is admissible at trial. *See United States v. Beltran-Rios* 878 F.2d 1208, 1211 (9th Cir. 1989). As was pointed out by the Ninth Circuit in that case,

> [d]rug courier profiles are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers . . . *Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officials in investigating criminal activity.* Drug courier profile evidence is nothing more than the opinion of those officers conducting an investigation . . . [W]e denounce the use of this type of evidence as substantive evidence of the defendant's innocence or guilt.

Id. at 1210 (9th Cir. 1989) (quoting *United States v. Hernandez-Cuartas* 717 F.2d 552, 555 (11th Cir. 1983)) (emphasis added).

In *Beltran*, the Court approved the use of such testimony only as rebuttal evidence, emphasizing "that the holding in this case is a relatively narrow one. The Government may introduce profile testimony of this sort only to rebut specific attempts by the defense to suggest innocence based on the particular characteristics described in the profile." *Beltran*, 878 F.2d at 1213 n.2. (emphasis added). In the absence of testimony that specifically attempts to suggest innocence based on the profile characteristics, such testimony must be precluded.

Likewise, this type of evidence is not admissible to explain the *modus operandi* of the defendant. The Ninth Circuit has stated that, "[w]hile it may be appropriate to recognize a modus operandi exception in certain cases, such as those involving *complex* drug smuggling conspiracies," it is inappropriate where there is no complex criminal scheme. *United States v. Lui*, 941 F.2d 844, 848 (9th Cir. 1991) (emphasis added).

The government has no need to explain a complex criminal scheme in order to prosecute Ms. Ohler. Ms. Ohler was arrested at the border driving a van found to contain approximately 81.9 pounds of marijuana. The government is not alleging or charging that Ms. Ohler is at the heart of a sophisticated smuggling ring, or running a multi-spoke drug conspiracy. The government is merely alleging importation and possession with intent to distribute, neither of which is a "complex" issue under the facts of this case. Therefore, the evidence of the agents regarding drug courier profile should not be permitted under the *modus operandi* exception.

III.

THIS COURT SHOULD NOT SEND THE INDICTMENT INTO THE JURY ROOM DURING DELIBERATIONS

The Ninth Circuit Model Jury Instructions were revised on April 27, 1996. In the commentary to Model Instruction 3.02.01, "Charge Against Defendant Not Evidence," the Committee on Model Jury Instructions has strongly recommended that the Indictment not be sent

into the jury room during deliberations. A copy of this specific revision is attached as Exhibit A.

Ms. Ohler urges this Court to follow the guidance of the Committee. As the commentary states, indictments are frequently phrased in the language of the statute. The language in the instant Indictment does indeed "track" the language of the charged statutes. Accordingly it is highly possible that jurors could be persuaded by the similarities alleged in the Indictment returned by the grand jury and the elements which must be proven in the charged statute. As the Indictment, by law, is proof of nothing in a criminal trial, it would be prejudicial and legally improper for a jury to be persuaded in this manner.

Ms. Ohler further asserts that sending the Indictment into the jury room allows the prosecutor to usurp the judge's role of instructing the jury on what is the applicable law. For this reason, Ms. Ohler also requests that the Court read the Indictment to the jury rather than allowing the prosecutor to usurp the authority of the Court in this manner. As the Ninth Circuit committee stated, the judge, not the prosecutor, should tell the jury what the charge is against the defendant and what the government must prove to establish guilt.

IV.

MOTION FOR ATTORNEY-CONDUCTED VOIR DIRE

Pursuant to Rule 24(a) of the Federal Rules of Criminal Procedure, defense counsel expressly requests the opportunity to personally *voir dire* the prospective jurors

so that Ms. Ohler may exercise her right to be tried fairly by an impartial jury in accordance with the Fifth and Sixth Amendments to the United States Constitution. Counsel requests fifteen minutes of personal *voir dire* in order to make reasonable inquiry of the jurors' perceptions regarding certain facts related to the government's prosecution and defendant's theory of the case.

A. Defendant Must Have A Fair, Impartial Jury

A defendant's right to a fair and impartial jury is guaranteed by the Constitution and is a fundamental predicate to a fair trial. The right to a fair and impartial jury is protected by the Fifth and Sixth Amendments. *Duncan v. Louisiana,* 391 U.S. 145 (1968). To permit an individual to be convicted on the basis of a proceeding tainted by bias and prejudice would violate the most basic values of our criminal justice system.

Many courts have also recognized that the right to a impartial jury entails the right to take reasonable steps designed to insure that the jury is impartial. *Ham v. South Carolina,* 409 U.S. 524, 532 (1973) (Marshall, J., concurring in part and dissenting in part). One of the most important means to insure an impartial jury is the right to strike those jurors who manifest an inability to try a case solely on the evidence. This right to exclude incompetent jurors cannot be exercised meaningfully or effectively unless counsel has sufficient information with which to evaluate members of the venire. *Turner v. Murray,* 476 U.S. 28 (1986). The range of inquiry in the quest to empanel a fair and impartial jury should be liberal. *United States v. Napoleone,* 349 F.2d 350, 353 (3d Cir. 1965).

Courts have not hesitated to reverse a conviction where limitations on *voir dire* have unreasonably infringed on a defendant's right to a neutral and impartial jury. *See Cook v. United States,* 379 F.2d 966 (5th Cir. 1967); *United States v. Baldwin,* 607 F.2d 1295 (9th Cir. 1979); *Turner v. Murray,* 476 U.S. 28 (1986); *Aldridge v. United States,* 283 U.S. 308; *United States v. Washington,* 819 F.2d 221 (9th Cir. 1987. As noted by Justice White in *Rosales-Lopez v. United States,* 451 U.S. 182, 183 (1981).

> [A]ny system for the empaneling of a jury that [prevents] or embarrasses the full unrestricted exercise by the accused of that right, must be condemned.

The need to determine the jurors' perceptions and biases is necessary to ensure Ms. Ohler a fair and wholly impartial jury.

B. Ms. Ohler Cannot Exercise Her Challenges Meaningfully Unless She Has Attorney Voir Dire.

Rule 24(a) of the Federal Rules of Criminal Procedure provides that the court may permit the parties to conduct the examination of the jurors or may elect to conduct the examination itself. Fed. R. Crim. P. 24(b) provides the government with six peremptory challenges and the defendant with ten peremptory challenges. While Fed. R. Crim. P. 24(a) allows the trial court wide discretion in conducting *voir dire, voir dire* may have little meaning if it is not conducted at least in part by counsel. In *United States v. Ible,* 630 F.2d 389, 395 (5th Cir. 1980), the Court articulates the difference between court and attorney *voir dire*. The court stated:

> The "federal" practice of almost exclusive *voir dire* examination by the court does not take in to account the fact that it is the parties, rather than the court who have a full grasp of the nuances of the strength and weaknesses of the case. Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes.

(quoting in part *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977)) (other citations omitted).

Federal courts have been concerned about the practice of attorney-conducted *voir dire* for fear that participation of counsel would require more time than *voir dire* conducted by the court alone. However, an attorney's familiarity with the case can also lead counsel to frame more narrowly focused questions which are more directly on point, and can in fact expedite the *voir dire* process.

Attorney-conducted *voir dire* can be a much better tool for eliciting bias and prejudice than is judge-conducted *voir dire*. The judge is the most highly respected authority figure in the courtroom. Court-conducted *voir dire* often involves leading questions suggesting the proper answer in the question. Since jurors have a desire to be liked and accepted by the judge they may mold their answers accordingly.

As the National Jury Project authors have noted:

> Most people seek approval and are predisposed to acquiesce to authority figures. When asked to evaluate themselves in the best possible or most "socially desirable light" . . . these tendencies increase when the questionnaire is a person of

> substantially higher status then the respondent. This phenomenon is compounded by the fact that the judge's perceived as an impartial and benevolent authority.

National Jury Product, *Jury Work: Systematic Techniques*, p. 37 (1978). Typically, court-conducted *voir dire* is a quick drill of questions which lead the witness to a "proper" response, rather than an heartfelt one.

If counsel in this case is allowed personal *voir dire*, counsel would attempt to draw out the jurors' biases and misconceptions in order to determine whether any jurors in the venire are unable to judge Ms. Ohler fairly. It is doubtful whether this goal could be achieved without attorney *voir dire*.

V.

RESPONSE AND OPPOSITION TO MOTIONS IN LIMINE FILED BY THE GOVERNMENT

A. THIS COURT SHOULD LIMIT THE EXPERT TESTIMONY PROPOSED BY THE GOVERNMENT

The government has expressed an intention to offer expert testimony on several issues. With respect to expert testimony with regard to the wholesale and retail value of the drugs, Ms. Ohler requests that the testimony be confined to wholesale value. It will presumably be the government's theory at trial that Ms. Ohler was knowingly transporting this load of marijuana across the border in order to deliver it to another person. If this is the case, then only testimony concerning wholesale value is relevant because Ms. Ohler would not be reaping the profits of any retail sales. Whatever probative value exists as to

knowledge would only apply up to the point where Ms. Ohler's participation ends. Accordingly, the value of the marijuana at the point where it is "delivered" to the party who was going to sell it at the retail level is the only value that is factually relevant – that is the wholesale value.

This argument is further supported by the cases cited in the government's motion. The cases cited by the government, notably *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir. 1994), involved typically heroin cases where law enforcement agents were permitted to testify with respect to how street value is impacted by cutting the drugs or by the quality of the drugs. As this case involves marijuana, rather than heroin or methamphetamine, such testimony is not necessary. For these reasons, Ms. Ohler requests that this Court restrict the testimony to wholesale value only.

The government has also indicated an intention to introduce testimony regarding the structure of drug organizations. Ms. Ohler refers to her motion to preclude testimony concerning drug courier profile testimony. Ms. Ohler simply requests that this Court rule on these matters as the testimony is elicited and objections are made at trial.

Citing *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997), the government intends to offer expert testimony that drug traffickers do not entrust a large amount of drugs to someone who doesn't know what he is transporting. In other words, the government would like to introduce testimony that Ms. Ohler had the requisite *mens rea*. This would directly violate Federal Rule of Evidence

704(b) by invading the province of the jury on the ultimate issue. Such testimony would essentially direct a guilty verdict.

In addition, this case is easily distinguishable from *Cordoba*. This case involves 81 pounds of marijuana that the government claims has a wholesale value of $41,000. *Cordoba* involved **over 300 kilograms** of cocaine. The government cannot point to a single 9th Circuit case involving a similar amount of marijuana where such testimony was deemed admissible. As *Cordoba* and the government argue that it is the **value** of the load of drugs that makes it probative of the defendant's knowledge of the presence of the drugs, the tremendous disparity of the value of the load in *Cordoba* compared to the load in this case belies the specious nature of the government's argument. Accordingly, the government should be prohibited from offering expert testimony that drug traffickers do not entrust loads of narcotics to unknowing transporters.

VI.

MS. OHLER'S PRIOR CONVICTION IS INADMISSIBLE FOR IMPEACHMENT PURPOSES PURSUANT TO FEDERAL RULE OF EVIDENCE 609 BECAUSE IT HAS NOT BEEN SHOWN TO HAVE BEEN PUNISHABLE BY IMPRISONMENT IN EXCESS OF ONE YEAR

Ms. Ohler suffered a conviction for a violation of California Health and Safety Code 11377(a) on June 29, 1993. Ms. Ohler was sentenced to 90 days custody and 3 years probation. The government intends to impeach Ms. Ohler with this conviction if she testifies. In the absence of proof that Ms. Ohler pled guilty to the felony version

of 11377(a) that is punishable by a term of imprisonment in excess of one year, the proposed impeachment is inadmissible according to the plain language of Federal Rule of Evidence 609.

Rule 609(a)(1) explicitly states that evidence that the accused has been convicted of a crime (subject to Fed R. Evid. 403 balancing test) "if the crime was punishable by death or imprisonment *in excess of one year under the law under which the witness was convicted.*" Health and Safety Code Section 11377(a) is a state court "wobbler" that can be charged as either a misdemeanor or a felony. To date, no Judgment & Commitment Order has been provided by the government indicating exactly whether Ms. Ohler's conviction was for a felony or a misdemeanor. As such, the threshold requirements for admissibility of this prior conviction for impeachment purposes under Federal Rule of Evidence 609 have not been met. Unless and until these requirements are fulfilled, Ms. Ohler objects to the use of this prior conviction under Fed. R. Evid. 609.

VII.

EVIDENCE OF MS. OHLER'S ALLEGED "DRUG HABIT" IS INADMISSIBLE UNDER FEDERAL [RULE] OF EVIDENCE 404(B)

The government intends to introduce evidence of Ms. Ohler's methamphetamine use "to show her motive for smuggling marijuana, to obtain money to support her drug habit." In support of their contention that Ms. Ohler has a drug habit, the government points to her sole criminal conviction for Possession of a Narcotic Substance, and to 2 positive tests submitted by Ms. Ohler

while on Pre-Trial release in this case. What the government fails to recognize is that Ms. Ohler, who drug tests 3 times per week with Pre-Trial Services, has tested clean well in excess of *50 times* while these charges have been pending. Accordingly, there is clearly insufficient evidence to find that Ms. Ohler actually has a drug habit to the extent that it would provide a motive for smuggling marijuana. Furthermore, the applicable case law and Federal Rule of Evidence 403 preclude the admission of such highly prejudicial and minimally probative evidence.

Federal Rule of Evidence 403 prohibits the admission of evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice has been defined as crating [sic] a tendency that the jury may decide the case on an emotional basis. *Los Angeles Police Protective League v. Gates*, 907 F.2d 879 (9th Cir. 1990). In the instant case, while there is admittedly evidence that Ms. Ohler has used drugs in the past and may have even have had a drug problem, there is no evidence to establish a drug dependency that would support a reasonable inference that she needs to drive loads across the border to support her drug habit. Accordingly, the proffered evidence has no rational nexus with motive.

United States v. McDonald, 905 F.2d 871 (5th Cir. 1990) is directly on point. Customs agents arrested McDonald as he tried to cross the border in El Paso, Texas with 70 pounds of marijuana in the gas tank and back seat of his car. McDonald was convicted after jury trial of importation of marijuana and possession of marijuana with intent to distribute. *Id.* at 873. On appeal, the 5th Circuit held that it was error for the trial court to permit the prosecutor to cross-examine McDonald about his past drug use.

The 5th Circuit held that drug usage was not probative of truthfulness and that evidence of McDonald's past usage was not relevant to determine whether he knowingly transported the marijuana on the date of his arrest. *Id.* at 875.

As the *McDonald* court noted, it is a large leap in rational inferences to conclude that because Ms. Ohler has used methamphetamine in the past she therefore likely knew her van contained marijuana on July 29, 1997. Where the probative value of proffered Fed. R. Evid. 404(b) evidence is very slight and there is merely a modest likelihood of unfair prejudice, the 9th Circuit has held that it is an abuse of discretion for the 404(b) evidence to be admitted. *United States v. Hitt*, 981 F.2d 422 (9th Cir. 1992). As there is, at best, minimal probative value to be gained from admission of Ms. Ohler's past drug usage, due to the substantial prejudice that would result, the government should be precluded from introducing this evidence.

VIII.

PURSUANT TO DOYLE V. OHIO THE GOVERNMENT MUST BE PRECLUDED FROM INTRODUCING EVIDENCE OF MS. OHLER'S SILENCE AFTER SHE HAD BEEN PLACED UNDER ARREST

In Motions In Limine filed by the government, the intent to elicit testimony from arresting agents regarding demeanor evidence has been given. Specifically, the government states that "government agents had the opportunity to watch defendant as they asked her questions and informed her of facts relating to the offenses

charged." (Pg. 16 of Government's Motions In Limine). The government intends to elicit testimony from the agents regarding Ms. Ohler's demeanor during this time period.

A. Ms. Ohler's Due Process Rights Will Be Violated If The Government Introduces Evidence that She Exhibited No Physical Reaction After Being Placed Under Arrest

It is a fundamental principle of due process that the government cannot use, at trial, a defendant's post-*Miranda* silence as substantive evidence of guilt. *United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995) (quoting *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976), "It does not comport with due process to permit the prosecution during trial to call attention to [the defendant's] silence."). Silence in the wake of *Miranda* warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Permitting the use of a defendant's silence to impeach or argue an inference of guilt, when the silence is at the time of arrest and after receiving *Miranda* warnings, violates the due process clause of the fourteenth Amendment because *Miranda* warnings contain an implicit guarantee that silence will carry no penalty. *Id.* at 619 (quoting *United States v. Hale*, 422 U.S. 171, 182-83 (1975)).

Ms. Ohler objects to any violation of her 5th Amendment rights. If the government introduces evidence that after being placed under arrest Ms. Ohler did not look surprised or she "just sat there," this will violate her right to due process of law. This Court should order the government to avoid attempting to elicit testimony that

would violate the Supreme Court rule set forth in *Doyle v. Ohio*.

IV.

IMPROPER CHARACTER EVIDENCE

Ms. Ohler has no objection to the government's motion.

X.

MS. OHLER HAS NO OBJECTION TO THE ADMISSION OF ROUTINE BOOKING INFORMATION BUT ANY REFERENCE TO DRUG USAGE OR WELFARE STATUS SHOULD BE PRECLUDED AS UNDULY PREJUDICIAL PURSUANT TO FEDERAL RULE OF EVIDENCE 403

Ms. Ohler concurs that responses to routine booking questions are not protected by the 5th Amendment. However, the Federal Rules of Evidence still apply and pursuant to Fed. R. Evid. 403 any evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. For the aforementioned reasons, Ms. Ohler's past drug usage is not probative of any material element in this case. Unless Ms. Ohler somehow opens the door to this evidence, it should not be admitted.

Similarly, any evidence of receiving welfare would only serve to prejudice Ms. Ohler and deprive her of a fair trial. For obvious reasons jurors who are taxpayers might be resentful toward a defendant who receives welfare. As the receipt of welfare does not tend to make the existence of any fact of consequence more or less likely, it

is not relevant. Fed. R. Evid. 401. For these reasons, the government should be precluded from introducing this evidence.

XI.

CONCLUSION

For the foregoing reasons the defense requests that the Court grant Ms. Ohler's motions *in limine*.

DATED: January 20, 1998

Respectfully submitted,

/s/ S. Todd Neal
S. TODD NEAL
Federal Defenders of
San Diego, Inc.
Attorneys for **Ms. Ohler**

[Exhibit Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In Limine Hearing before the Honorable Jeffrey T. Miller

[Caption Omitted In Printing]

[2] San Diego, California – Monday, January 26, 1998

THE CLERK: Case number 15, 97-2278, United States of America versus Maria Ohler for motion hearing and motions in limine.

MR. NEAL: Good afternoon, your Honor. Todd Neal, Federal Defenders, on behalf of Ms. Ohler, who is present on bond.

MR. KELLY: Your Honor, good afternoon. Kevin Kelly on behalf of the United States. Your Honor, I apologize for the – sort of the new face in the courtroom – for rather short notice. The Assistant assigned to the case previously, Michael Kaplan, has been called away this week, so I will be taking the case.

THE COURT: All right. What is the status of the case at this time, counsel?

MR. NEAL: Your Honor, we're still intending to go to trial in this case.

THE COURT: All right. Are there any motions that need to be addressed at this time?

MR. NEAL: There are a number of motions in limine to be addressed, your Honor.

THE COURT: All right.

MR. NEAL: May Ms. Ohler sit while we discuss that?

THE COURT: Certainly, absolutely. I have reviewed the [3] motions in limine. First motion in limine filed by the defense is to prevent the testimony of agents regarding drug courier profile. Anything further on that, Mr. Neal?

MR. NEAL: No, your Honor. I sort of incorporated that motion into motion in limine No. 2 made by the Government, which was to admit expert testimony regarding the structure of drug organizations. And I'd just ask that we make the appropriate objections as the testimony is elicited and rule on those, ask that your Honor rule on those as the evidence comes out.

I think that we're probably all pretty much in agreement on what constitutes a drug courier profile, and I just think it's an issue that we should deal with when it comes up in trial.

MR. KELLY: Your Honor, as the Government's papers indicate, we don't have any intention of introducing drug courier profile as the Ninth Circuit typically defines it. However, I think there is a larger issue here with respect to the drug smuggling operation and the so-called *Cordoba* testimony. It would be the Government's position that the Government should be permitted to admit that kind of evidence, particularly in a case like this. I'm sure Mr. Neal, as his papers indicate, would oppose that.

THE COURT: Mr. Neal?

MR. NEAL: I do, your Honor. The testimony the [4] Government is referring to is proposed expert testimony that drugs smugglers never entrust a load to an

unknowing driver; in other words, they want to have an expert testify, a law enforcement agent testify that people driving loads across the border always know what they're transporting. And that testimony was permitted in the *Cordoba* case, but I believe that this case is easily distinguished from *Cordoba*, your Honor. *Cordoba* involves over 300 kilograms of cocaine, and this case involves 81 pounds of marijuana that I believe the Government has stated in their papers would have a wholesale value of about $41,000. Now, over 300 kilograms of cocaine, or about 650 or 700 pounds, is worth millions and millions of dollars, and my understanding of the Ninth Circuit opinion in *Cordoba* is that the testimony was found to be permissible on the theory that as valuable as this load was, it was probative of knowledge to allow – and therefore that gave the foundation for the expert to be able to testify that no one would ever entrust something this valuable to a person who didn't know what was in the car. Well, I just think we have apples and oranges here because we're dealing with a much, much lower net worth amount given that this is an 81-pound marijuana case as compared to a 300-kilogram cocaine case.

I also think under Federal Rule of Evidence 704 (b) that this would be impermissible testimony that would violate Ms. Ohler's due process rights. Essentially it would be [5] allowing expert testimony on the requisite mental state, which is the only issue in dispute for purposes of trial. I think basically it would be allowing the Government to introduce expert testimony that this substance was tested and it is in fact marijuana, that an agent will testify that in my experience 81 pounds is an amount intended for distribution; and if the Government is able

to introduce this line of testimony, there will be expert opinion offered that the person driving always knows what's in the car. That's it. It's essentially a directed verdict of guilty I believe by way of expert testimony. And I think because this case is distinguishable from *Cordoba* and because of Rule 704 (b) that the Court should not allow this line of testimony.

THE COURT: If the testimony were in fact that the courier always knows that there's drugs in existence, then the reasonable inference would be that this particular defendant, that is, any particular individual would have to have knowledge. If the testimony is that generally this is the circumstance, then in effect is it still a statement that your client does in fact have the requisite mental state, as you point out, in other words, if it's qualified, if there's a reference that generally these individuals know, couriers know –

MR. NEAL: Well, I don't think that – if that is the extent of the testimony permitted, I don't think that would be [6] invading the province of the jury on the question of Ms. Ohler's mental state. So I don't think by virtue of that testimony the jury would have to infer that she must have known also. But if we're just speaking in general terms, then I think it becomes a question of relevance.

I of course would agree with the Court that I would prefer that the Government be limited to eliciting testimony that generally couriers know, but I think that when we get to general terms, it's in the abstract, it's not connected to this case specifically.

THE COURT: In essence isn't that always what profile evidence is; it's in evidence in general terms?

MR. NEAL: Yes.

THE COURT: Let's see what Mr. Kelly's position is on that.

MR. KELLY: Your Honor, literally, I suppose figuratively, the question here is the weight to be attributed to the testimony. Mr. Neal is a fine lawyer, and he has –

THE COURT: What would the testimony be?

MR. KELLY: – ample opportunity –

THE COURT: What would the testimony be?

MR. KELLY: Well, given the Court's expressed perhaps inclination, of course it would be the Government's position that *Cordoba*, straight as it was decided, ought to be introduced. We could certainly qualify the testimony in more [7] generic, general terms such that any concerns about invading the province of the jury would be alleviated. But this whole issue of it was cocaine or heroin or 300 kilograms or 80 pounds of marijuana, that I believe is clouding the issue somewhat. It is the jury – the jury's decision how much weight to attribute to the fact that it was marijuana, that it had a $78,000 street value or $41,000 wholesale value. They're capable and competent of making that decision, and the Government would therefore seek to introduce and believes it's actually very important to the Government's case.

This is a case, your Honor, where the defendant invoked; it's not the Government – the Government is not

seeking to gild the lily or there's not a surfeit of evidence in this case, your Honor.

THE COURT: All right. I don't know that there's a problem at this point, Mr. Neal, given Mr. Kelly's position as to how the evidence will come out. I think that perhaps the better course would be to have you reserve your objection to any individual question, and we'll see how the question is asked and what the proffer is.

MR. NEAL: Well, your Honor, that concerns me – because I think if the Government is allowed to ask an agent do couriers always know what they're transporting and the agent is allowed to state yes, they do, it in my mind would not be a situation where the jury is left to decide how much weight to [8] give that evidence. They're not being given any wiggle room or told to decide to use your own discretion how much weight and emphasis to give to this ambiguous testimony; they're being told that one hundred percent of the time couriers know. And I, first of all, don't believe that to be the truth; but secondly, this case is so distinguishable, I'm not comfortable getting to a point in trial where the Government asks that question and then I have to object because it would be trying to unring a bell that would be devastating to our defense.

THE COURT: I think under the facts of this case, it would not behoove any agent to take the stand and testify that in 100 percent of cases couriers know of the existence of contraband of drugs. That is tantamount to the agent saying this individual defendant or any individual defendant in fact knew, which I believe does

unfairly invade the province of the jury in this kind of a case.

I think it's another thing, however, for the profile testimony to come in, Mr. Kelly, and I thought that is what you indicated you would do in this case, that's where you would go.

MR. KELLY: And my comment's just made, your Honor, with –

THE COURT: Yes.

MR. KELLY: Certainly, your Honor, we would abide by the Court's decision in this case, and no testimony will be elicited to the effect that couriers know 100 percent of the [9] time or absolutely must know.

THE COURT: Or that couriers – well, you've said it yourself better than I could paraphrase your thoughts at this time. All right, gentleman. That's fine. You'll reserve any objection as well, Mr. Neal?

MR. NEAL: Yes, your Honor. There's one other issue with respect to expert testimony that relates to whether the Government should be permitted to introduce evidence of simply the wholesale value of the marijuana or also the retail value of the marijuana.

I requested in my papers that the Government be limited to introducing evidence of the wholesale value for basically two reasons, and that is that I believe that it will be the Government's theory that Ms. Ohler was knowingly crossing this load of marijuana with the intent to deliver the load to another person/party. I don't believe that there's any evidence or any indication that the Government is going to try to suggest that Ms. Ohler was

actually going to sell this marijuana on the street, and because her participation is alleged to have been limited to driving this across the border and giving it to another person, and that leg of the transaction I believe only implicates the wholesale value because the retail value does not become important or it doesn't come to fruition until it's in the hands of the actual dealer, your Honor.

The cases that the Government cited basically are I [10] believe heroin and methamphetamine cases where there was expert testimony allowed concerning the cutting of the drugs, the quality of the drugs; and how that affects street value. I understand that the value of the load is something that they should be able to argue knowledge, you can infer knowledge from that value, but I think that should be limited to wholesale value.

THE COURT: Mr. Kelly?

MR. KELLY: Your Honor, I think that the case law – once again, Mr. Neal tries to draw a distinction between heroin and cocaine and marijuana. The fact is they are all controlled substances. This is critical. The retail value, as the case law makes clear, ought to be admitted. It is critical to the Government's case to prove knowledge. With that the Government will submit.

THE COURT: All right. Defendant's motion in limine to prevent testimony of the retail value of the drugs in question is denied. Mr. Neal?

MR. NEAL: Your Honor, we have entered into a stipulation that the substance involved is in fact marijuana, we've stipulated to the chain of custody, and we

would also be amenable to a stipulation that this was an amount intended for distribution.

I think under the Supreme Court case of *Old Chief* from last year where we are agreeing to stipulate to an element, the [11] Government basically has to accept that. And I understand that the Court has ruled they can introduce evidence of retail value, but any protracted testimony concerning, you know, this is 81 pounds, does anyone smoke 81 pounds themselves, is it possible this could have been personal use is unnecessary given our willingness to stipulate.

THE COURT: Mr. Kelly?

MR. KELLY: Your Honor, although I appreciate Mr. Neal's offer to stipulate, the Government respectfully declines to accept it. It is truly the – one of the linchpins of the Government's case. Again, this is not a case in which there is a surfeit of evidence to prove knowledge. The Government has to go on the value, what is it exactly that the defendant was carrying, what is it exactly that she was entrusted with, and I believe the Government has the right to do that, your Honor.

THE COURT: So this is a variation on the earlier motion, Mr. Neal, to prevent or preclude evidence of the retail value given the stipulations you're willing to enter into?

MR. NEAL: Sort of. I understand you're allowing the retail value to come in. I'm just saying that even though the retail value comes in, any lengthy questioning about how much could one person have as personal use and is there any way that this 41 pounds could have been

personal use is unnecessary because we will stipulate this was a distributable amount.

THE COURT: I would suggest you make your position [12] clearly known at the earliest possible time with the jury. It tends to diffuse the issue; in a sense you're allowing or you're asking for some kind of limiting instruction from the Court that this evidence may be utilized only to a certain degree or mentioned a certain number of times and thereafter it becomes argumentative, and/or prejudicial. I'm going to not make any further rulings in this regard. The motion has been denied with respect to the evidence coming in, and we'll just see how that plays out, Mr. Neal, given the stipulations you're entering into.

Anything further that needs to be addressed in motions in limine?

MR. KELLY: I believe a few matters, your Honor.

THE COURT: Okay.

MR. KELLY: Your Honor, the Government has sought to introduce the defendant's prior conviction – arrest and conviction for methamphetamine possession; the Government would seek to introduce that under 404 (b). And under the case law cited in the Government's papers, I have just prior to coming to court, your Honor, photocopied a case, *United States v. Santa Cruz*, 48 F3d. 1118, which is cited in the Government's papers. But in that case, the defendant was convicted of possession of one gram of cocaine, and the court of appeals ruled that it was not error to admit that conviction in a subsequent

trial for trafficking. Specifically, the Court said Santa Cruz's prior [13] act made his knowledge of the charged offense more probable. It occurred just 12 weeks earlier. It served to rebut his argument that he had not knowingly participated in the drug transaction and that his possession of cocaine was accidental.

The Government would expect that that will be in some variation the defendant's case – the defendant's argument that she did not know about it, that it was accidental. The Government would therefore seek to introduce it under 404 (b).

THE COURT: Mr. Neal?

MR. NEAL: Your Honor, I oppose the motion that this evidence comes in under 404 (b). I think in order for the Government to be able to use 404 (b) to get this in, the Government would have to show that Ms. Ohler has a methamphetamine habit that is sufficiently expensive that that created a motive for her to drive this load across the border.

This conviction for possession under 11377 (a) of the Health and Safety Code is from five years ago. Ms. Ohler has been out on bond in this case. She's been drug testing with Pretrial Services over the past six months three times per week. She did have two tests that were positive about four months ago I believe downstairs in front of Judge Aaron, but she has tested clean well in excess of 50 times.

This would be very powerful evidence if the Government was allowed to suggest that this woman has a habit

that would require her or give her a motive to go out and transport [14] narcotics.

I cited a case from the Fifth Circuit, *United States v. McDonald*, I think that is directly on point, your Honor; it's on pages 13 and 14 of my motions. This was a case where Mr. McDonald was arrested at the border in El Paso with 70 pounds of marijuana in the gas tank and back seat of his car. At trial the prosecutor was permitted to cross-examine the defendant about his past drug use. So this isn't even a case where it came in presumably under 404 (b) in the Government's case in chief; it came in for impeachment purposes during the defense case. The court of appeals held that it is a very large leap in rational inferences to conclude that because they used methamphetamine in the past, that therefore makes it more likely that they knew they were transporting marijuana on the date in question, which in this case was July 29, 1997. So I just don't think there's a sufficient nexus between any evidence of drug usage and the allegations in the case.

If she had a multitude of arrests for being under the influence and convictions and in this case had demonstrated that she has a methamphetamine habit that essentially makes her a junkie, maybe we're talking motive, but I think the Government falls far short of showing that in this case.

MR. KELLY: Your Honor, to be clear, the Government is offering the 404 (b) evidence under two theories, only one of which is motive. And even if the Government were to accept the [15] fact that addiction is not necessarily demonstrated as a result of one conviction

and that she has tested cleanly over 50 times, I should alert the Court to the fact that the 50 clean tests occurred post-arrest – not obviously indicative of her state either during or prior to her arrest. But the Government is offering it both under motive.

This is a person who has by her own biographical information, the booking information, she is a self-employed flower arranger who is receiving California benefits, welfare benefits. I think it's clear in this kind of a circumstance that if she has a – an addiction and she needs the money – this is a person who does not have a great deal of money, she needs to make it. Now, that's only one of the theories. The second theory and the one to which *Santa Cruz* speaks very directly and clearly is that it is evidence of knowledge. Once again, irrespective of the money aspect of it, irrespective of the motive, it goes to knowledge, and the jury ought to hear it and the jury can assign whenever weight it chooses to that.

THE COURT: *Santa Cruz* was a case where there was a real temporal relationship between the conviction for drug possession or drug use and the charge of drug trafficking. It was a very short interim of time there. Here we have a five-year period of time, and I have concern as to whether or not a conviction for mere drug possession is close enough in time in this case to justify the argument you're making on the [16] probative value of the evidence. So can you be a little more responsive to that particular concern?

MR. KELLY: Your Honor, understanding the Court's concern, and obviously the Court knows the *Santa Cruz* case well – it was a temporally – it was a

conviction of the subsequent trial far closer in time. The test – the case law under 404 (b), however, the Government would be well within the time period during which other 404 (b) evidence has been ruled admissible by the Ninth Circuit.

THE COURT: That may be true for another ground or another rationale for probative value, but here the rationale is that if one is a drug user or has ever been convicted of a drug use offense within five years of a trafficking charge, then one – or the trier of fact should draw the inference that one is more inclined to engage in drug trafficking if one has in effect ever sustained a conviction for a personal use offense.

MR. KELLY: The difference in this case, your Honor, is that, as the Government has pointed out, at best she is an occasionally self-employed flower arranger who is on benefits who also tested dirty twice while this case was pending.

THE COURT: If you're talking now about economic motive at or about the time of the alleged conduct in this case, then don't we have to look at this particular point in time rather than going back five years and determining what her circumstances were five years ago or judging what she did today [17] by an act of personal use that she might have engaged in five years ago?

MR. KELLY: That's a good point, your Honor. I sort of fell into the same confusion of the issues. The Court is absolutely right, one is motive, one's knowledge. It would be the Government's position that the knowledge component stands in its own right, and it's admissible simply as going to make her knowledge more

probable of a drug trafficking conviction even five years later.

Now, we would also argue that under motive there is a drug problem here, there is financial distress here, and the defendant – it makes it more likely that the defendant transported drugs in order to support that drug problem.

THE COURT: If that's your argument as to economic necessity or whatever, if you can establish that through competent evidence, then you're free to establish that as it relates to motive, but attempting to use a five-year-old conviction for personal use as constructive knowledge that on a particular occasion the defendant knowingly transported drugs or contraband of a different type entirely I think is a stretch. It's obviously prejudicial. The question is whether or not the probative value on that evidence is – on the issue of knowledge is outweighed by the prejudicial effect. I think given the circumstances of the prior conviction, it would be, and I will grant the motion in limine with respect to that prior [18] conviction.

MR. NEAL: Thank you, your Honor.

MR. KELLY: Your Honor, do I understand the Court to be saying that if the Government can prove financial distress in some way that this evidence can come in, that is, by proof of the receipt of benefits, the proof of occasional or lack of employment? I just want to be clear as to the Court's ruling.

THE COURT: If your position is that current financial or at least financial status at the time of the alleged conduct is relevant as it provides a motive, I think

if you can establish that through competent evidence that is not unduly prejudicial, you may do so. It's difficult for the Court to prejudge every conceivable bit of evidence you may want to introduce in that regard.

Once again, if we're looking at individual pieces of evidence, then I have to determine whether or not any prejudicial value or prejudicial effect of that particular evidence is going to outweigh any probative value.

MR. KELLY: To be specific, your Honor, the Government as indicated in another one of its motions in limine it would seek to introduce evidence of the two dirty drug tests; that is evidence of a continuing drug problem and addiction. I know Mr. Neal has opposed those motions, but specifically the Government would seek to introduce that, once again as evidence of motive.

THE COURT: Mr. Neal?

[19] MR. NEAL: Again, your Honor, I just think –

THE COURT: As to motive, Mr. Neal.

MR. NEAL: I just think this is – there's an insufficient nexus, your Honor, to establish that Ms. Ohler has the type of drug addiction that is so expensive that it creates a motive for her to transport drugs across the border. There's no foundation that exists to show that she uses so many times per week, it costs X amount of dollars, and that she has no other way of paying that. There's just no nexus between the two positive tests and a motive to drive a load across the border. I mean what about the 50 or 60 clean tests? Maybe I should be able –

THE COURT: I'm sure that Mr. Kelly would not in any way oppose your effort to introduce evidence of 50 or 60 incidents of clean testing if in fact he were to proffer the dirty testing. Mr. Kelly?

MR. KELLY: That's correct, your Honor.

MR. NEAL: I wouldn't want to make that trade-off, your Honor. I think on 403 grounds that to allow the jury to hear that she has had two positive tests during the seven-month period this case has been pending would basically create the inference that she's a bad person, it would make the jury dislike her, and I think that that would certainly hinder her ability to get a fair trial.

The real question is admissibility here, and if the [20] theory of admissibility is motive, I think there's an insufficient foundation based on two tests to infer that she's got a motive to transport drugs. There has been no showing that she has this expensive habit that would give rise to a motive.

THE COURT: Is it your position, Mr. Kelly, that evidence that Ms. Ohler on two separate occasions during a seven-month period tested positive for – what kind of drug?

MR. KELLY: Methamphetamine.

THE COURT: – methamphetamine, she tested positive for methamphetamine that that evidence is probative on the issue of motive?

MR. KELLY: That's correct, your Honor. Simply put, once again given the defendant's situation, she is self-employed, perhaps unemployed, receiving benefits,

and if she has a drug addiction, I think that speaks very clearly to motive; she needs money to support the habit.

THE COURT: All right. If that is the ground upon which you seek to introduce two tests out of a total of 60 or 70 tests over a seven-month period of time, I will grant the motion.

Once again, I think that the fact that the defendant used methamphetamine on two occasions, has tested positively on two occasions, does not establish motive. In any event, any prejudicial effect of the testing on those two occasions is in my view undue prejudice and outweighs the probative value of the [21] testing on those two specific occasions as it relates to motive. You're just proffering motive at this point; I don't see the connection.

MR. NEAL: The Government's motion to admit this 404 (b) has been denied as to motive and as to knowledge?

THE COURT: If that is the further – well, the ground was motive, Mr. Neal; I've denied it as to motive. That was the entire rationale for this argument that Mr. Kelly just made, motive, and that's where the test results are unduly prejudicial. Any probative value relating to motive is outweighed by the undue prejudice.

MR. NEAL: Thank you, your Honor. Your Honor, with regard to the discussion concerning financial status and whether her economic circumstances would create a motive to drive drugs across the border, this is not a motion that the Government made in its in-limine papers, so I did not brief this issue. However, it is my understanding that there is case law from the Ninth

Circuit that says that evidence that a person is poor basically cannot be used as evidence of criminal motive for 403 – on 403 grounds. I believe the case states that if the Government is allowed to introduce evidence that a person is poor and therefore they've got the motive to commit crimes, that that type of evidence is so sweeping and it would encompass so many people that, you know, truly may or may not have a motive to commit crimes that it's unduly prejudicial. And this I [22] believe relates to the Government's motion to admit the routine booking information, which I'm not opposing that in principle, but I don't believe the Government should be able to admit any evidence of welfare status. I think if taxpaying jurors hear that this is a woman who is on AFDC or collecting food stamps that the prejudicial value from that will be so great that it would be impossible for her to get a fair trial.

THE COURT: Well, I'd wait to see your case. You indicate there's a Ninth Circuit case on that issue, and I'll defer any ruling on that, giving you a chance to submit your case unless, Mr. Kelly, you want to respond at this point.

MR. KELLY: Well, not having seen the case, your Honor, obviously I can't respond specifically except to say that I believe it would mislead the jury to exclude that kind of information. The jury has a right to know that this is a woman who may not be employed and who receives welfare benefits.

THE COURT: All right. We'll take a look at the case then, Mr. Neal, when you have it.

MR. NEAL: We're starting Wednesday?

THE COURT: Yes.

MR. NEAL: If I bring it Wednesday morning, you can address that?

THE COURT: I would suggest you file and serve it before then. I assume it's at your fingertips or readily accessible. If you can file and serve it tomorrow, I'll have a [23] better opportunity to look at it.

MR. NEAL: I'll do that, your Honor.

THE COURT: Okay.

MR. NEAL: Your Honor, there was one other indication in the Government's papers regarding using statements that Ms. Ohler made to her Pretrial Services officer for impeachment purposes. I have had a discussion with Mr. Kelly about Title 18 U.S. Code Section 3153, specifically Section (c)(1). It's my belief that this statute precludes the Government from using any statements made to Pretrial for purposes of trial. And I don't know if this is an issue that needs to be dealt with on the record or if Mr. Kelly concedes that.

MR. KELLY: Your Honor, that might in fact be the case. Mr. Neal certainly points to the relevant statute. The Government's position in this case is that we wouldn't at this point seek to call as a witness the Pretrial Services officer, who would then testify as to conversations which, arguably, under the statute, might be confidential. However, the facts of this OSC include an admission by the defendant and letters submitted by the Pretrial Services officer in which he indicates that the defendant has denied prior drug use. My understanding

is that those letters are made a part of the court record and therefore do not fall within the proscription of 3153.

MR. NEAL: Your Honor, may I pass out a copy of the relevant statute?

[24] THE COURT: Have you two had a chance to confer on this question?

MR. KELLY: A little bit, your Honor.

MR. NEAL: Your Honor, I believe that if we look to Section (c)(1), it states "Information obtained in the course of performing Pretrial Services functions." I think that's all encompassing, so whether something later becomes a part of the court file, the question is what is its origin; its origin was it was something that was developed in the course of performing Pretrial Services functions.

THE COURT: Mr. Kelly?

MR. KELLY: Your Honor, having spoken with the Pretrial Services officer just this morning on the statutory proscription, he is reluctant to take the stand because of this very statute. He expressed to me his belief that we may fall without that proscription insofar as the letter that she submitted to the Court and became part of the permanent file indicates that the defendant initially denied a history of drug use.

THE COURT: Isn't that information obtained in the course of performing Pretrial Services functions in this case?

MR. KELLY: It may be, your Honor, but the difference here is that it has been published in a public

manner. And once again, it wouldn't be a question of the Government calling the Pretrial Services officer, it is simply making reference to the [25] public record and specific – and the specific content of that.

THE COURT: What is the public record?

THE CLERK: Those aren't put in the file; the letters to the judges aren't put in the file, only the OSC.

MR. KELLY: Your Honor, on August 12 Pretrial Services Officer Kathy Larson addressed Judge Aaron – in the third paragraph.

THE COURT: Is that a public record though?

MR. KELLY: I believe it is, your Honor.

THE COURT: What makes it a public record? How does it get imposed to the public?

MR. KELLY: Because it becomes part of the permanent file.

THE COURT: Well, are you sure about that?

MR. KELLY: I'm not sure about it, your Honor.

THE COURT: I think you better do some research on that. I think that that kind of a document falls within the general proscription here in Section (c)(1), does not meet the exception of Section (c)(2). But take a further look at it if you would.

MR. KELLY: I will, your Honor. Thank you.

THE COURT: All right.

MR. NEAL: Just two additional motions, your Honor. There's a motion pending for admission of this

1993 conviction for 11377 (a) under 609, and it was my understanding at the time [26] the papers were filed, I don't think either party had the court records from that case; but it was my understanding that that Health and Safety Code section is a wobbler, and I had objected to the admission under 609 at least until the threshold requirements of 609 were fulfilled, in other words, that it was a conviction punishable by a term of imprisonment exceeding one year.

I now concede that Ms. Ohler pled to the felony portion of that penal code section. However, I would object to the use of this prior conviction under 609. My objection is based on Rule 403. And again, I don't want to belabor the point, but I just believe that if the jury hears that she has a prior conviction for possession of a personal-use quantity of methamphetamine, the effect of that will be that many jurors will instantly be so prejudiced that they will reject anything that Ms. Ohler would have to say on any other matter in the case, and I think that it would deprive her of a fair trial. I don't think it's probative. The issue here is knowledge. There's no indication that using methamphetamine five years ago makes it more likely that she knew there was marijuana jammed in the side panels of this van on July 29, 1997, so I think the probative value is very minimal, and I think the prejudice could be great.

THE COURT: Mr. Kelly?

MR. KELLY: Your Honor, I believe this falls square – [27] squarely within 609. It is a felony conviction. If the defendant chooses to take the stand, I think she ought to be – the Government ought to be permitted

to impeach the defendant with a prior conviction. This falls squarely within Rule 609.

THE COURT: And you are arguing what, that it's an imperative that the evidence come in or it's within judicial discretion and that judicial discretion should be exercised in such a way that it be kept out? What's your argument in that regard?

MR. KELLY: Your Honor, it's a judicial discretion matter. It is not – it is not an imperative –

THE COURT: All right.

MR. KELLY: – based on –

THE COURT: Tell me how I should exercise my discretion and why.

MR. KELLY: Your Honor, once again, in order for the jury to have a complete picture of what went on here, particularly in light of the Court's granting of the defendant's motion in limine to exclude as 404 (b) evidence, I think there's a great danger here of misleading the jury. And the jury's entitled to have the credibility of the witness tested and impeached, and that impeachment – one of the standard impeachment techniques or tools is a prior felony conviction, prior felony conviction for drugs.

It would be the Government's position that this is [28] something that's important and critical to the Government's case if the defendant chooses to take the stand we would be deprived of.

THE COURT: I know your position is that it's critical. I'm asking you to explain how this Court should

analyze such issues as remoteness in time, the similarity of the prior conviction to the present charge, questions dealing with issues of moral turpitude, the nature of the act itself, its ability to shed evidence on a defendant's characteristics of truth, veracity, honesty. Those are the kinds of things I'm looking to hear.

MR. KELLY: Your Honor, Rule 609 does not require the same kind of four-part 404 (b) –

THE COURT: Not asking for a *Castro* kind of four-part analysis, but if you're asking me to exercise discretion, those are the kinds of things that should be looked at. I realize we don't have a *People v. Castro* imperative here, but –

MR. KELLY: Your Honor, the conviction obviously falls within the ten-year time frame within which – to which 609 speaks; it's five years out.

In terms of the witness's capacity for truth telling, I think it's very probative of truth telling, particularly, frankly, in light of the subsequent dirty tests, the subsequent urinalysis tests that the Court has denied the Government at least in its case in chief.

[29] THE COURT: How does it relate to truth telling?

MR. KELLY: Because frankly I believe that there is case law, although I don't believe that Mr. Kaplan has cited it, that truthfulness can be impeached by prior drug use, that a drug user's capacity for truthfulness may be impeached –

MR. NEAL: Your Honor, I request –

THE COURT: Hold on, Mr. Neal.

MR. KELLY: – by drug use. I'm not certain of that, frankly, your Honor, but this is – obviously we're dealing with a possession charge as opposed to an importation charge or even, frankly, a possession with intent to distribute charge. I don't believe that that prior conviction was a possession with intent to distribute; I believe it was simply a possession charge. However, it does involve narcotics, it involves controlled substances. Yes, it's five years out, but five years out is not too remote in time statutorily, and, in fact, in this case there's a history, there's a possibility at least of a continuing drug problem.

My belief is that if the Court were to exercise its discretion and permit it at least on cross-examination for impeachment that the jury would have a full and accurate view of the circumstances of this alleged offense, and to the extent that Mr. Neal would like to address those points, he can do so on redirect.

THE COURT: Mr. Neal?

[30] MR. NEAL: Your Honor, my understanding of the law with regard to whether a drug usage conviction is held to be probative of truthfulness is the exact opposite of Mr. Kelly's understanding, and I would just request that this is something that we also supplement our briefing on perhaps tomorrow.

The case law under 609 provides that a prior conviction can be admitted if the punishment was – was punishable by in excess of one year's imprisonment. The second prong of that is if it involved dishonesty or a false statement. This is really what I'm referring to. I believe there

are cases that say that drug usage is not probative of dishonesty or veracity.

THE COURT: Federal cases or state cases?

MR. NEAL: Federal cases, Ninth Circuit case law, I believe, your Honor.

MR. KELLY: That may well be, your Honor, but Mr. Neal is looking at 609 (a)(2), which refers to any crime regardless of whether it's a felony or misdemeanor may be admitted at the discretion of the Court if it involves the kind of dishonesty the Government would be seeking to introduce under 609 (a)(1).

THE COURT: I think Mr. Kelly is making a direct distinction under 609, Mr. Neal.

MR. NEAL: Correct, your Honor, but Mr. Kelly was saying that your Honor's questions regarding remoteness in time and misleading the jury and prejudice, that those were not things that 609 requires. I disagree because 609 (a)(1) [31] specifically incorporates Rule 403, and 403 requires that your Honor in exercising the Court's discretion evaluate the admissibility of the evidence based on those specific factors.

THE COURT: I'll certainly give it some additional thought. You indicate you may have a case or two that you want to bring to my attention, Mr. Neal, on the connection between a drug possession conviction and one's propensity to tell the truth.

Are you informing the Court that if this – well, that your client will in fact testify if in fact your motion here is granted?

MR. NEAL: If my motion is granted?

THE COURT: In other words, if this prior conviction – I don't know whether it's the request of the Government for an order allowing it or – I think that's probably the way it is at this point – I don't think you've addressed a motion in limine against it, Mr. Neal.

In any event, are you advising the Court that your client will in fact testify if this prior conviction is ruled inadmissible, and she will not testify if the Court rules that she may be impeached with this prior conviction?

MR. NEAL: I think that's a pretty fair assessment, your Honor. Of course, I would like to hear the presentation of the Government's case, but I believe that what your Honor stated is pretty much right on.

[32] THE COURT: Okay. I'll be happy to take a look at that additional case you mention, Mr. Neal.

MR. NEAL: Thank you, your Honor.

THE COURT: And I'll defer ruling on that question.

MR. NEAL: I think the only other motion that's in dispute is the Government's motion in limine to demeanor evidence. And I filed an opposition to this motion, your Honor, because there was some language in the Government's motion relating to their intent to have the agents testify that – I'm quoting here from page 16 of the Government's motion – Government agents had the opportunity to watch defendant as they asked her questions and informed her of facts relating to the offenses charged. And I filed an opposition citing *Doyle v. Ohio*

and of course asking that your Honor preclude the Government from eliciting any testimony relating to any post-Miranda silence. If Ms. Ohler sort of just sat there or didn't come out with a denial, I don't think that's permissible evidence; I think it could violate her due process rights. I think it's a Fifth Amendment violation under the Supreme Court rule of *Doyle*. I make that in-limine motion as well.

MR. KELLY: Your Honor, the Government has no intention of offering any evidence with respect to the defendant's demeanor after advisement of her Miranda rights and the invocation thereof.

THE COURT: All right.

[33] MR. NEAL: Thank you.

THE COURT: Mr. Neal, anything further?

MR. NEAL: Well, there would be attorney voir dire, your Honor.

THE COURT: Yes.

MR. NEAL: How long will that be, your Honor?

THE COURT: How long would you like?

MR. NEAL: Fifteen minutes.

THE COURT: All right. I think that's reasonable.

MR. NEAL: Thank you.

MR. KELLY: Your Honor, could I take up one last issue with the Court? For purposes of clarifying the

Government's leeway with respect to the OSC, apart from the letters and the confidentiality issue, if the defendant takes the stand, is it permissible – is the Court permitting the Government to impeach on the basis of the two failed urinalyses? That's a related but separate question from the statements made to Pretrial Services Officer Larson and incorporated in the letter.

THE COURT: This issue of drug use – now we're revisiting what's already been decided; I think you're asking for clarification, however.

MR. KELLY: I am, your Honor.

THE COURT: I think this issue of drug use was predicated upon the rationale that somehow it proves motive. I think that's where you were going with this initially. That [34] rationale applied to the 404 (b) attempt to get the five-year-old conviction in, and it was also an underlying basis for your effort apparently to make some mention of the two dirty tests.

My earlier ruling was predicated upon your proffer that this evidence was related to motive, and in my view if that's the purpose of that evidence, then any probative value as it relates to motive is outweighed by the undue prejudice to the defendant of those test results coming in.

MR. KELLY: Simply to take it one step beyond, your Honor, with respect to my 404 (b) analysis, I was predicating it on motive. However, in the impeachment context, I would be seeking to introduce it simply as to the truthfulness. Now, I understand that that might be subsumed within the Court's concern, expressed concern with regard to the conviction, but I would be seeking

simply to cross-examine the witness and to allay issues of truthfulness.

THE COURT: On the fact she's tested dirty?

MR. KELLY: That's correct.

THE COURT: Your rationale is that people who use drugs, whether they test dirty once or twice over a significant period of time or whether they're addicts, are less likely to tell the truth than people who don't use drugs. Is that your position?

MR. KELLY: I suppose in a general way that is my [35] position, your Honor, except what I prefer to do is simply reserve that issue in a sense that the Court has precluded the Government from offering it strictly on the issue of motive but if it becomes relevant in another context. And the Government can revisit that issue with the Court.

THE COURT: You can always revisit the issue, Mr. Kelly. No ruling I make is with prejudice; I always keep an open mind. If you're attempting to justify evidence of dirty drug testing on the rationale that it has impeachment value because someone who uses drugs on one or more occasions is less likely to tell the truth and you have authority for that proposition, case law or authority, I would be happy to read it. I think Mr. Neal indicated he had a case he wanted to bring to my attention in that regard.

MR. NEAL: Yes, your Honor, but, your Honor, with regard to cross-examination of the defendant, it is my understanding that would only become admissible for impeachment purposes if we somehow open the door.

In other words, Mr. Kelly could not just stand up out of the blue and say isn't it possible you tested positive twice –

THE COURT: That's true. That's correct.

MR. NEAL: – as impeachment.

THE COURT: For example, if your client testified and she volunteered beyond the scope of your question and all of a sudden made a statement that she would never transport drugs, [36] and as a matter of fact, she's never even used drugs, that would certainly open up the issue on the question of impeachment. I think under that kind of scenario, that kind of evidence would clearly be admissible.

MR. NEAL: I'll try to make sure that doesn't happen.

THE COURT: I'm sure you will. I'll try to take a look at any additional cases you have that you'd like to submit tomorrow, and, Mr. Kelly, if you want to do a little research on this point – on the two points we've discussed, I'll be happy to read anything you've submitted tomorrow.

MR. KELLY: Thank you, your Honor.

THE COURT: Anything further then?

MR. NEAL: No, your Honor.

THE COURT: Okay. We'll see you Wednesday at nine o'clock.

MR. KELLY: Thank you, your Honor. (The proceedings were concluded.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

SUPPLEMENTAL IN LIMINE BRIEFING

TO: ALAN D. BERSIN, UNITED STATES ATTORNEY, AND KEVIN J. KELLY, ASSISTANT UNITED STATES ATTORNEY:

I.

THE GOVERNMENT SHOULD BE PRECLUDED FROM INTRODUCTION EVIDENCE OF POVERTY OR WELFARE STATUS TO ESTABLISH CRIMINAL MOTIVE

The Ninth Circuit has examined the use of an individual's financial condition to prove motive. *United States v. Jackson*, 882 F.2d 1444 (9th Cir. 1989) (a copy of this opinion is attached as Exhibit A). The *Jackson* Court distinguished between two lines of cases that discuss evidence of financial condition to prove motive: general evidence of financial hardship, and specific evidence of financial hardship. *Id.* at 1450.

In its discussion, the *Jackson* Court noted that the former line of cases resists "linking poverty with motivations to commit crimes." *Id.* at 1449. Thus, admission of general evidence of a defendant's poverty is an abuse of discretion because "juries must not be permitted to assume that just because the defendant is poor he is likely to commit a crime to obtain money." *Id.* (discussing cases).

The *Jackson* Court distinguished cases that abhor general evidence of financial condition from the latter line of cases that permits introduction of specific evidence of financial condition: "courts admitting evidence of financial motive have been confronted with more than the mere fact that the defendant is poor." *Id.* As examples, the *Jackson* Court cited cases where a bank robber's heroin habit provided motive for robbery, or evidence that a defendant had amassed large debts as probative of motive to commit a crime for financial gain. *Id.* (discussing cases). In the latter line of cases, a **specific link** exists to connect the evidence of poverty with the motivation of the offense. *Id.*

In *Jackson*, the district court permitted testimony that the defendant was short of funds and experiencing financial difficulty. *Id.* Although inclosing it "mentioned" the testimony about financial hardship, the government "did not argue that Jackson was poor and therefore he participated in this scheme." *Id.* at 1450. Therefore, the *Jackson* Court, after deciding the evidence before it fell somewhere between the general and the specific, held that the admission of evidence of financial hardship in that case was not error. *Id.*

Ms. Ohler's case differs from *Jackson*. The government has not offered any specific link between Ms. Ohler's unemployed/welfare status and motive to commit the instant offense. Accordingly, the evidence that the government seeks to introduce is merely **general evidence** of Ms. Ohler's indigency as motive.

Poverty alone does not indicate a motive to commit a crime. *Id.* As the *Jackson* case makes clear, there must be

evidence "imminent financial burden" or pressure to overcome the general resistance to linking poverty with motive to commit crimes. *Id.* at 1449. ("Those courts admitting evidence of financial motive have been confronted with more than the mere fact that the defendant is poor").[1] No specific evidence exists in this case indicating that Ms. Ohler was in debt or in need of an infusion of cash to overcome an imminent financial burden. At best, the evidence merely establishes that she is poor. Accordingly, the evidence proffered by the government is simply generalized evidence of poverty status that is inadmissible.

---

[1] Justice Reinhardt, (dissenting):

> Nevertheless, even if there is a link between poverty and crime, we have consistently excluded generalized evidence of poverty on the ground that this evidence wrongly casts suspicion on the disadvantaged and affords them unequal treatment with members of more privileged classes;
>
> I suspect that poor people are already sufficiently disadvantaged by our criminal justice system that we do not need to invite images of steretype and prejudice into the jury box.
>
> When the prosecution has attempted to introduce generalized evidence of monetary need that is shared by a great number of people, the federal appellate courts have been virtually unanimous in their condemnation of that evidence.

Jackson at 1452.

II.

THE GOVERNMENT SHOULD BE PRECLUDED FROM USING A 1993 POSSESSION OF METHAMPHETAMINE CONVICTION TO IMPEACH MS. OHLER'S TESTIMONY

In deciding whether to allow the government to impeach Ms. Ohler's testimony pursuant to federal Rule of Evidence 609(a)(1) with her sole criminal conviction, a 1993 Possession of Methamphetamine for Personal Use Charge, this Court inquired of the government as to how evidence of this conviction would be more probative than prejudicial. The government contends that evidence of this conviction is highly probative of Ms. Ohler's truthfulness. After defense counsel stated that he believed the law of the Ninth Circuit holds that evidence of past drug usage is not relevant to truthfulness or veracity, this Court requested case law on the issue.

In *United States v. Mehrmanesh*, 689 F.2d 822 (9th Cir. 1982), the appellate court found it error to rule that a defendant's prior conviction for smuggling hashish was automatically admissible should he choose to testify. The court reasoned that convictions for surreptitious activity do not bear *directly* on the likelihood that the defendant will testify truthfully. *Id.*[2]

---

[2] The most common kinds of convictions probative of truthfulness are: (federal) forgery, income tax fraud, bribery, bankruptcy fraud, making false statements; (state) forgery, bribery, false pretenses, cheating, embezzlement, swindling, false advertising, fraud on creditors, issuing bad checks, etc. Weinstein's Federal Evidence, 2nd Edition, Matthew Bender, November, 1997.

In determining the admissibility of a prior conviction under Fed. R. Evid. 609(a)(1), it is the burden of the prosecution to establish that the probative value of conviction outweighs its prejudicial effect. *United States v. Hendershot*, 614 F.2d 648, 652 (9th Cir. 1980). Trial courts are to consider the impeachment value of the prior crime, when the incident occurred, similarity of the crime, the importance of the defendant's testimony, and the centrality of the credibility issue. *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995).

Where a defendant's testimony is critical in demonstrating validity of her defense, this factor weights against admission. *United States v. Jackson*, 627 F.2d 1198, 1209 (D.C. Cir. 1980). As this Court is aware, the instant case is a "border-bust" case where Ms. Ohler was driving a vehicle across the border that was found to contain 81 pounds of marijuana concealed in the side panels. Ms. Ohler is the registered owner of this vehicle. Given her ownership, the jury will certainly want to hear her testimony concerning who could have placed this marijuana in her van. No other witness can testify to the factual circumstances leading up to Ms. Ohler's arrest. Without her testimony, the defense will be deprived of an opportunity to get Ms. Ohler's defense theory in front of the jury. As such, her VI Amendment right to present a defense to the charges will be severely limited.

In *United States v. Wallace*, 848 F.2d 1464, 1473 (9th Cir. 1988), the admission of a prior conviction for trafficking in heroin was found to be prejudicial in prosecution for possession with intent to distribute heroin. Similarly, Ms. Ohler will suffer great prejudice if her prior conviction for Possession of Methamphetamine is admitted in

this case. It is reasonable to believe that some jurors will reflexively reject the remainder of Ms. Ohler's testimony due to their strong feelings against drug usage. Further, jurors might unfairly infer that one who uses drugs would also likely smuggle drugs. This would be unduly prejudicial.

While it may be correct to state that one who uses drugs is more likely to smuggle drugs than a person who doesn't use drugs, it is also undeniably true that countless people who have used drugs before would never participate in a drug smuggling venture. Accordingly, the probative value of admitting this conviction would be greatly outweighed by its prejudicial effect. The defense requests that the government be prohibited from introducing the conviction pursuant to Fed. R. Evid. 609(a)(1).

Respectfully submitted,

/s/ S. Todd Neal
S. TODD NEAL
Federal Defenders of
San Diego, Inc.
Attorneys for **Ms. Ohler**

DATED: January 26, 1998

[Exhibit Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

GOVERNMENT'S SUPPLEMENTAL BRIEF REGARDING USE OF DEFENDANT'S PRIOR DRUG CONVICTION FOR IMPEACHMENT UNDER RULE 609 OF THE FEDERAL RULES OF EVIDENCE

Plaintiff UNITED STATES OF AMERICA, by and through its counsel Alan D. Bersin, United States Attorney, and Kevin J. Kelly, Assistant United States Attorney, hereby files its Supplemental Brief Regarding Use of Defendant's Prior Drug Conviction for Impeachment Under Rule 609 of the Federal Rules of Evidence, together with the attached statement of facts and memorandum of points and authorities.

I.

STATEMENT OF FACTS

The Government respectfully requests that the Statement of Facts included in the Government's Trial Memorandum, filed with this Court on January 22, 1998, be incorporated in its entirety herein by reference.

II.

POINTS AND AUTHORITIES

A. The Evidence is Admissible Under Rule 609

Federal Rule of Evidence 609(a) provides:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. . . .

Fed. R. Evid. 609(a). If Defendant Maria Suzuki-Ohler (hereinafter, "Defendant") chooses to testify at trial, the Government should be permitted to introduce evidence of her felony conviction for possession of methamphetamine. This conviction, having occurred on April 20, 1993, represents a felony conviction less than ten years old. Thus, the Court must determine only whether the probative value of these felonies outweighs the prejudicial effect to the defendant. *See* Rule 609(a).

In *United States v. Browne*, 829 F.2d 760 (9th Cir. 1987), *cert. denied*, 485 U.S. 991 (1987), the Ninth Circuit listed five factors that a district court should balance in making the determination required by Rule 609. Specifically, the court must consider (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness' subsequent history; (3) the similarity between

the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility. *United States v. Browne*, 829 F.2d at 762-763.[1]

In this case, it is anticipated that Defendant will claim that she was simply a victim whose van was equipped for illicit purposes of which she was totally unaware. Thus, her credibility is squarely at issue. The Government should not be prevented from demonstrating Defendant's lack of trustworthiness. *See United States v. Cook*, 608 F.2d 1175, 1187 (9th Cir. 1979) (*en banc*), *cert. denied*, 444 U.S. 1034 (1980), *overruled on other grounds, Luce v. United States*, 469 U.S. 38 (1984) (holding that the Government should not be prevented from providing information to the jury that undercuts defendant's trustworthiness). Evidence of Defendant's conviction for possession of methamphetamine should be available for use by the Government to impeach Defendant should she choose to testify at trial.

Recent Ninth Circuit case law supports the proposition that the Government should be permitted to test the witness' credibility in this fashion. In *United States v. Alexander*, the defendant, on trial for bank robbery, sought to preclude admission of evidence concerning prior felony convictions for residential robbery and possession of rock cocaine for sale. *United States v. Alexander*, 48 F.3d 1477 (9th Cir.), *cert. denied*, 116 S. Ct. 210 (1995).

---

[1] In *Browne*, the Ninth Circuit held that the district court did not abuse its discretion in admitting evidence of the defendant's prior conviction for bank robbery during a bank robbery trial. *Id.* at 764.

While noting that bank robbery was not per se a crime of dishonesty, thus rendering such evidence inadmissible under the terms of Federal Rule of Evidence 608(a)(2),[2] the Court concluded that under Rule 609(a)(1), evidence of both convictions was more probative of the defendant's credibility than prejudicial to his defense. *United States v. Alexander*, 48 F.3d at 1488.

The Court's analysis began with an affirmation of the continued viability of the 5-part balancing test to which earlier reference is made. As to part one, the Court ruled unequivocally that:

> We have previously stated that 'prior convictions for robbery are probative of veracity' (citation omitted). **The same is true of prior convictions for drug offenses.**

United States v. Alexander, 48 F.3d at 1488 (emphasis added). *See United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997) ("[p]rior convictions for drug offenses are probative of veracity, which was at issue"). Thus, in this case, case law makes undeniably clear that Defendant's methamphetamine conviction is probative of veracity.

As to part two, the conviction falls well within the 10-year time frame mandated by Rule 609(a)(1). In *United States v. Cordoba*, the Ninth Circuit held that a nearly 10-year-old (1985) conviction was not impermissibly stale.

---

[2] Federal Rule of Evidence 609(a)(2) provides, in pertinent part:

> [E]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Fed. R. Evid. 609(a)(2).

United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997). In addition, apart from the fact that, "[b]y its terms, Rule 609 allows for the admissibility of such a prior conviction even where the defendant has been released for up to ten years," Defendant should not be permitted to mislead the jury into believing that she had one aberational episode. The Ninth Circuit has addressed this point in emphatic terms:

> [It] is not surprising that the [district] court was unwilling to let a man with a substantial criminal history misrepresent himself to the jury, with the government forced to sit silently by, looking at a criminal record which, if made known, would give the jury a more comprehensive view of the trustworthiness of the defendant as a witness.

United States v. Alexander, 48 F.3d at 1488, quoting *United States v. Cook*, 608 F.2d 1175, 1187 (9th Cir. 1979) (en banc), *cert. denied*, 444 U.S. 1034 (1980), *overruled on other rounds*, *Luce v. United States*, 469 U.S. 38 (1984).

This is not a Defendant who has led a law-abiding and clean life, save for the instant charges. She was charged with a drug offense and entered a diversionary program in 1991; she pled guilty to possession of a controlled substance in 1993; and she tested positive for amphetamine/methamphetamine while on pre-trial release in the case at bar.

As to part three, Defendant was convicted of possession of methamphetamine use; she is not charged with marijuana importation and possession with intent to distribute. The crimes are sufficiently distinct to pass the third prong of the balancing test. Indeed, in *Browne*, the

Court went so far as to say that what matters is the totality of the circumstances, such that even "a prior bank robbery conviction [is] not inadmissible per se, merely because the offense was identical to that for which [the defendant] was on trial. *United States v. Alexander*, 48 F.3d at 1488, quoting *United States v. Browne*, 829 F.2d at 763.[3]

As to the final two factors, the Ninth Circuit has held that:

> When a defendant takes the stand and denies having committed the charged offense, he places his credibility directly at issue.

United States v. Alexander, 48 F.3d at 1489. Here, knowledge is the only issue. If Defendant takes the stand, her credibility will constitute the one and only triable fact. *See United States v. Charmley*, 764 F.2d 675, 677 (9th Cir. 1985) (upholding trial court's admission of prior convictions for both bank robbery and forgery in bank robbery trial); *United States v. Oaxaca*, 569 F.2d 518, 527 (9th Cir. 1978), *cert. denied*, 439 U.S. 926 (1978) ("in light of [defendant's] alibi defense" his credibility "was a key issue in the case").

---

[3] In *United States v. Perkins*, 937 F.2d 1397 (9th Cir. 1991), the Court concluded that "the admission under Rule 609 of a bank robbery conviction in a bank robbery trial is not an abuse of discretion when the conviction serves a proper impeachment purpose, such as when the defendant's testimony and credibility are central to the case." 937 F.2d at 1406. Thus, the appellate court held that although the conviction was similar to the offense at trial, such similarity did not bar admission of the prior conviction. *Id.*

Considered as a whole, the five governing factors enumerated by the Ninth Circuit favor admission of evidence of Defendant's prior drug possession conviction. The probative impact vastly outweighs any possible resulting prejudice, which can be further minimized by a limiting jury instruction.

III.

CONCLUSION

For the foregoing reasons, the government requests that it be permitted to introduce Defendant's prior drug conviction as impeachment evidence should she choose to testify at trial.

DATED: January 27, 1998.

Respectfully submitted,

ALAN D. BERSIN
United States Attorney
/s/ Kevin J. Kelly
KEVIN J. KELLY
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Trial Before the Honorable Jeffrey T. Miller, 1/28/98

[Caption Omitted In Printing]

[2] San Diego, California – Wednesday, January 28, 1998

THE CLERK: Case number two, 97-2278, United States of America versus Maria Suzuki Ohler for jury trial, first day.

MR. NEAL: Todd Neal, Federal Defenders, on behalf of Ms. Ohler, who is present on bond.

MR. KELLY: Good morning, your Honor. Kevin Kelly on behalf of the United States.

THE COURT: Good morning, counsel. I have received a supplemental pleading with respect to the – well, there are two issues that have been dealt with by Mr. Neal and a couple of issues addressed in a supplemental briefing by the Government. In any event, both sides further address the issue of the prior conviction and its possible use for impeachment purposes. I have read the pleadings that have been submitted.

Additionally – Mr. Neal, is there anything else you'd like to mention at this time?

MR. NEAL: Your Honor, I also addressed the issue of evidence of poverty of welfare status, the admissibility of that evidence.

THE COURT: I think we have that issue resolved at this point unless there was some further request on the part of the Government to use general

evidence of poverty as evidence of a propensity or motive to commit the crime with which the defendant is charged.

[3] MR. KELLY: Your Honor, just to be clear, at the last hearing it was the Court's ruling that, as I understood it to be, we'd take it more or less on a question-by-question basis as trial developed, and the Court would determine whether it was relevant.

THE COURT: I think the last time we were together, I expressed some concern about any evidence of mere poverty or financial status, overall financial status, as a motive, and I think the cases express that same concern and make the distinction between generalized financial status or poverty and a specific basis of financial need. That's been addressed in Mr. Neal's supplemental briefing. I think you've had an opportunity to review that, Mr. Kelly.

MR. KELLY: I did, your Honor. Your Honor, do I understand the Court's ruling, however, to permit the Government to broach the subject of the defendant's financial condition as it relates to other perhaps relevant testimony and evidence more specifically apart from the motive – in a general sense that the defendant is addicted to drugs and therefore needs money, and more specifically, for instance, how she can afford to purchase a van six weeks before – before she's stopped at the San Ysidro, port of entry, a van for which she –

THE COURT: You're mixing a lot of things here together. First of all, you're attempting to bootstrap into the defendant's financial status the fact now that she was addicted [4] to drugs, and I'm not aware of any evidence indicating that she was addicted to drugs. And now

you're talking about recent purchases of the defendant juxtaposed against apparently some generalized lack of financial ability to make big ticket purchases, and that, once again, gets back into that. So you're mixing an awful lot of things here together.

We were speaking about specifically the admissibility of general financial status, general poverty, on the issue that's being addressed and evidence of general poverty, general financial status. The mere fact that a defendant is on welfare or receiving welfare benefits I think under the circumstances of this case would be inadmissible as I read the cases.

Now, if there is some other specific, particularized instance of financial status that you feel falls within the distinction made by the cases, I'd be happy to hear it. But to all of a sudden move into an inquiry that she's an alleged addict is not what that inquiry is about.

MR. KELLY: Your Honor, perhaps I have not made myself clear. I understand the Court's ruling with respect to the drug addiction, and I will certainly abide by the Court's decision. What I'm wanting is greater clarification apart from that issue, completely distinct, as to the relevance with respect to the defendant's financial condition and her ability to purchase a vehicle merely six weeks before she was stopped at the San Ysidro port of entry.

[5] THE COURT: The only way you could use something like that would be to establish as a predicate her general financial status or her general poverty, then to compare the fact she made a vehicle purchase to her

general state of poverty or the fact that she's on welfare. That is what I think the cases say you cannot do.

MR. KELLY: Your Honor, I think it paints a misleading portrait of the defendant, but I'll obviously abide by the Court's ruling.

THE COURT: I'll be happy to look at any case that you'd like to proffer on that particular issue. I haven't seen anything thus far.

MR. NEAL: And in terms of it being potentially misleading, I of course will not suggest to the Court that she's a rich woman who would have no reason to ever consider doing this. But I believe that your Honor's recitation of the case law is correct. I would ask that Government counsel be instructed to instruct his witnesses not to testify that she was collecting welfare benefits. I think it falls under this umbrella of law, and I think it's also inadmissible under 403 grounds.

THE COURT: I think that's the only issue before me at this particular point, that is, the admissibility that the defendant was receiving welfare benefits. As I've said, that falls within the proscription against generalized evidence of [6] poverty. And counsel is certainly aware of the ruling. I know that he'll alert his people. He doesn't need to be ordered by the Court to do that.

MR. KELLY: I will, your Honor.

MR. NEAL: Thank you, your Honor.

THE COURT: All right. The other issue, once again, deals with the use of that prior conviction for

impeachment purposes. Anything further on that, Mr. Neal?

MR. NEAL: Your Honor, I think we have argued it fully, and we've briefed it. I don't know if there's a particular prong of the five considerations that your Honor would like us to address. I focused mostly on whether that conviction for personal use possession of methamphetamine is probative of Ms. Ohler's truthfulness because on Monday that is what the Government's proffer was for saying that this evidence would be more probative than prejudicial. And I believe that the case law states that personal drug usage is not indicative of a person's truthfulness. So I'd submit on that.

THE COURT: Does the case law say that? I don't think you've cited a case that says that, that personal drug usage is not indicative of credibility or lack thereof.

MR. NEAL: I believe –

THE COURT: I have questioned that myself, and I have had authorities now brought to my attention – obviously we have the five-point test that was enumerated in the *Brown* case, and [7] then Mr. Kelly cites the *Alexander* case dealing with prior convictions for bank robbery and a drug offense. The drug offense in that case happened to be sales of illegal drugs, not mere possession for personal use, although there is a generalized statement in *Alexander* that drug offenses, that is, prior convictions for drug offenses can be utilized for impeachment purposes.

Now is this Court to limit that language to the drug offense that was before the *Alexander* court or am I to take a broader reading of that particular statement? I have not seen any case submitted by you though, Mr. Neal, that indicates that drug convictions predicated upon personal use should not be used for impeachment purposes.

MR. NEAL: Well, I believe that the Mirmanish (phonetic) case I cited on page 4 is supportive of that case. I believe the *Wallace* case I cited on page 5 is also supportive of that.

THE COURT: Are you saying that one of those cases specifically states that a drug offense, a prior drug conviction based upon personal use rather than trafficking or sales or importation or manufacture, should not be used?

MR. NEAL: I believe those cases specifically dealt with past conduct relating to smuggling or trafficking, your Honor. That's true, they did not focus directly on a personal use prior; however, the other cases that I've cited, and going [8] back to some of the treatises such as Winestein's Federal Evidence, the priors recognized by the case law to be most probative of truthfulness relate more to fraudulent forgery, false representation type behavior. And we know that so many people in the country use drugs on a personal use level, and to say that because a person has used drugs before that that means they are likely untruthful I believe is a quantum leap. I think the relevant effect of this evidence would be that a lot of the jurors would decide that Ms. Ohler is someone who has used drugs before and therefore she knows what this whole drug smuggling business is all about and I

think that that is just incorrect. A lot of people have used drugs before, I submit, that would have no idea how drugs are purchased on a wholesale level, how they are brought into the country, and I just don't think that this prior conviction can survive that 403 test because what little probative value there is – if there is some small part of personal use drug, a personal use drug conviction, if there is some probativeness of that to say that this person is probably less likely to be truthful than a person who doesn't have that type of prior, that may be a fair statement, but I think it's minimal, the probative value of that. And when you compare it to the prejudicial effect that it's going to have, I think it outweighs it, and it's the Government's burden of proof when offering a prior conviction under 609 to establish that it will be substantially more probative than prejudicial, and I [9] don't think this one can satisfy that test. And for that reason I don't think your Honor should allow it for 609 purposes.

THE COURT: Mr. Kelly?

MR. KELLY: Your Honor, the Court invited the parties to submit authorities on the subject. I found clear Ninth Circuit precedence, albeit in the context of importation. *Alexander* states, however, unequivocally prior drug offenses; it doesn't qualify it. The Ninth Circuit says prior drug offenses. The Ninth Circuit had the opportunity to revisit that in *Cordoba*. The Ninth Circuit came back down and reiterated that prior drug offenses are probative of veracity.

That was what your Honor was looking for from the Government, authority for that proposition. Mr. Neal has not cited anything. In fact, Mr. Neal's cases go to either

the 609 (a)(2) prong, which deals with truthfulness, or the 608 (b) analysis, which also deals with truthfulness. And in that context he may well be right that the forgeries and the frauds, et cetera, et cetera, might be more applicable to those specific provisions of the Federal Rules of Evidence. But 609 (a) (1) is now, in the context of these cases, it's very clear drug offenses are probative of veracity.

I've cited numerous cases in which – with respect to the prejudice. All five prongs are easily satisfied particularly, your Honor, and I don't want to hit this issue too, too hard, but the OSC letter of which your Honor is now the [10] recipient indicates once again this is not a person who is lily white. If she chooses to take the stand, your Honor should examine the totality of the circumstances, as precedence requires, and say it would be misleading. It would be just as if when the Ninth Circuit said it is not surprising that the district court was unwilling to let a man with substantial criminal history misrepresent himself to the jury with the Government forced to sit idly by looking at a criminal record which, if made known, would give the jury no comprehensive view of the truthworthiness (sic) of the defendant as a witness.

With that I would submit, your Honor.

MR. NEAL: Make I make one brief final point? I believe that this would be an illogical analysis. To say that trafficking is obviously a greater offense than using – to smuggle drugs is worse under the law than to use drugs.

If we can agree that the case law says that smuggling or trafficking in drugs is not probative of truthfulness, how can the lesser offense then become – the lesser

offense being using drugs – then become probative of truthfulness? It defies logic.

THE COURT: I think you may be in error there. I don't think there's case law that says smuggling or trafficking of drugs and convictions therefore are not probative of the issue of credibility.

MR. NEAL: Your Honor, those are the cases that I just [11] spoke of, Mirmanish and *Wallace* that I cited in my papers that hold that. I thought that your Honor was saying you've seen cases that stand for the proposition that trafficking is not probative of truthfulness, but I haven't cited a specific case that says personal use is not probative of truthfulness.

What I'm saying, if the case law says trafficking is the greater offense, how can we say the lesser offense of using is –

THE COURT: *Alexander* is the latest case on point, is it not, from this circuit?

MR. KELLY: Actually, your Honor, I would submit that *Cordoba* is probably the latest case. But the more full description would be *Alexander*, yes.

THE COURT: As I understand Mirmanish, Mr. Neal, that case basically held that it was error for the trial court to automatically hold that a drug smuggling conviction was admissible without some kind of analysis. Isn't that what that case stands for?

MR. NEAL: In addition to the fact that I believe the Court held that convictions for surreptitious activity such as smuggling do not bear directly on the likelihood that a defendant will testify truthfully, and that is why

I'm saying that case stands for the proposition that a trafficking conviction is not necessarily probative of truthfulness.

THE COURT: The *Wallace* case of which you cite in your [12] papers was a case where basically the prior conviction for heroin trafficking was found to be prejudicial in light of the similarity of the prior conviction to the crime charged in that case and for which the defendant was on trial, another heroin charge, correct?

MR. NEAL: I don't know that similarity was the reason it was found to be more prejudicial than probative.

THE COURT: It was prejudicial because it was close. I mean they were – those types of crimes were related under I think part three of the five-part test. I think that was the basis for the ruling; is that correct?

MR. NEAL: I'm certain that that was one of the factors. I don't know that that was the strongest consideration for the Court's ruling. But again, your Honor, I do think many jurors will think that there is great similarity between Ms. Ohler's prior conviction and the allegations in this case. A lot of jurors of course have never had any involvement with them, and to them drugs are drugs, there is not a lot of difference between using and dealing and the whole ball of wax, and I believe that will result in prejudice.

THE COURT: All right. I think I've heard the arguments at this point. Mr. Kelly, do you have anything new to bring to the Court at this time?

MR. KELLY: I don't, your Honor. I would have responded to Mr. Neal, but I'm –

[13] THE COURT: I think you would have responded in a similar fashion to what you've argued previously. I do think we do need to get this issue resolved.

Well, I will say at the threshold that this is a very close call. You may not see it as such, but it is a close call. Looking at the factors under *U.S. v. Brown*, I will deny the motion in limine to preclude evidence of the defendant's prior conviction for methamphetamine use. There is some impeachment value to that. Drug offenses this circuit has indicated, do have some impeachment value. Perhaps one day we will get a refinement of *Alexander* and perhaps a distinction, if a distinction is to be made, between personal use convictions and other types of drug convictions. There is some impeachment value.

The point in time of the conviction and the witness's conduct under question in this case is not so remote so as to create undue prejudice. We're clearly well within the ten-year rule, and we have a conviction within five years. There is some similarity between the prior conviction and the charged crime in this case, but once again, the prior conviction is for mere use whereas this charge is a smuggling charge.

Mr. Neal, I think you can certainly make the distinction that you've attempted to make in argument to the Court. There is obviously some importance to the defendant's testimony in this case. But I think the centrality of the [14] defendant's credibility in this case is obviously very significant, and so that if the defendant does take

the stand, she should be capable of being impeached. And I think that the factors set forth in *Brown* weigh slightly in favor of the allowability of that prior conviction for impeachment purposes and, as I say, weigh slightly – realizing that there is a substantial prima facie case that the prosecution has to make.

I think that looking at probative value versus prejudice that the probative value is outweighed by the prejudice in light of the argument that you can make, Mr. Neal, related to time and also the dissimilarity between the convictions.

* * *

[58] THE COURT: All right. That's fine. You can deal with that I think on your voir dire. It's been brought to my attention I may have in the statement of my ruling relating to the use of the prior conviction for impeachment purposes indicated that the probative value of the prior corroboration was outweighed by possible prejudice, and if that was what I in fact said, I meant the converse to be true, that the prejudice – any prejudice would be outweighed by the probative value of the use of the prior conviction. I want to make that record clear. We'll see you at 1:30.

(There was a break in the proceedings.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Trial Before the Honorable Jeffrey T. Miller, 1/29/98

[Caption Omitted In Printing]

[4] San Diego, California –
Thursday, January 29, 1998

(Jury voir dire and opening statements, not designated as part of the record on appeal, are omitted from this transcript.)

THE COURT: Counsel are here in U.S. v. Ohler.

MR. NEAL: Good morning, your Honor. Todd Neal, Federal Defenders, on behalf Ms. Ohler; she's present on bond.

MR. KELLY: Good morning, your Honor. Kevin Kelly on behalf of the United States.

THE COURT: Counsel, it's been reported to me by Pretrial Services that defendant tested negative in connection with the test that was administered yesterday afternoon. I'm directing defendant to report to Pretrial Services this afternoon once court recesses for the day as well as tomorrow afternoon after court recesses for the day unless otherwise ordered, and I am contemplating conducting an OSC on the test results of the January 26 test, that OSC to go forward once the jury begins its deliberations in this case. So I'm sharing my thoughts with you at this time. I have advised Pretrial Services of the likelihood that they could be called to proceed with the OSC.

One further matter, and that pertains to these tests, all tests and test results that apply in this case, and it

dovetails a bit with the Court's ruling on the permissibility of [5] the prior conviction, drug conviction, for impeachment purposes. As you know, I have up to this point in time denied the Government's ability to use any test results in connection with this case as direct impeachment and also as motive evidence. I don't know if your client is going to testify in this case, Mr. Neal, but if she does, obviously the prior conviction can be used for impeachment purposes. I would like to alert you to a problem that I foresee developing depending upon how you wish to diffuse the impact, if any, of that prior conviction which could be utilized by the Government.

If you imply to the jury that that was a one-time circumstance and that there is no evidence whatsoever that your client has ever engaged in any kind of drug activity, personal use other [sic] otherwise, obviously that kind of an argument – that kind of an implication runs afoul of evidence to the contrary. It's one thing for you to attempt to distinguish between the nature of the prior offense and the charges in this case. It's acceptable for you, obviously, to make references, appropriate references as to time, but to go beyond that and to characterize the state of the evidence as somehow indicating your client has been drug free ever since may well result in an admonition from the Court; so you may open up the door there to the admissibility of that for further impeachment, direct impeachment, depending upon how the evidence comes out or how you argue, and you may run the risk of the Court admonishing the [6] jury appropriately.

I bring that up at this point to diffuse the potential for any problem along those lines, and if you have any questions, I'd certainly be happy to address them.

MR. NEAL: No, I understand completely, your Honor. Thank you.

THE COURT: Okay. All right. I think we're clear until nine.

MR. KELLY: Your Honor, I just have one sort of ministerial question, and that is the marijuana – once it's introduced into evidence – Courts vary as to how they prefer to have it laid out. I believe this is the only table in this courtroom. Does your Honor have any preference as to how to display it to the jury?

THE COURT: I don't have any preference. Your request is what at this point, Mr. Kelly, just to have it repose –

MR. KELLY: Just to avoid an awkward moment as to how your Honor would prefer that it be laid out. Clearly the end of counsel table here is a bit small. My preference I guess would be to have it in front of the Court.

THE COURT: Mr. Neal?

MR. NEAL: Well, I would just ask that after the exhibit has been admitted in evidence that it not be kept out any time longer than necessary or – if it's up in this area, I think it's fine. I've tried cases before where the Government [7] likes to put it on the very far corner of that table; I would ask that that not be done.

THE COURT: I've usually had it in the well. The table Mr. Kelly is suggesting is located basically below the bench and in the middle of the well, and I think that's appropriate. So go ahead, Mr. Kelly, you may display the drugs in that manner.

MR. KELLY: Thank you, your Honor.

THE COURT: Okay.

(There was a break in the proceedings.)

* * *

[155] MR. NEAL: Your Honor, the defense calls Maria Ohler.

Maria Suzuki Ohler

the defendant, was sworn and testified as follows:

THE CLERK: Would you please state your full name and spell the last name for the record.

THE WITNESS: Maria Suzuki Ohler, O-h-l-e-r.

Direct Examination

BY MR. NEAL: Q. Ms. Ohler, I'd like to start with some background information. Where do you live?

A. 4019 Cottonwood Street, San Diego.

Q. How long have you lived at that address?

A. Three and a half years.

Q. And how long have you lived in San Diego?

A. Most of my life.

Q. Where were you born at?

A. I was born in Tijuana, Mexico.

Q. And what is your citizenship status?

A. American citizen.

Q. And how did you become an American citizen?

A. My father made me use it.

Q. Is that by virtue of naturalization?

A. Yes.

Q. Ms. Ohler, are you married?

A. No, I am not.

Q. Have you ever been married?

[156] A. Yes, I have.

Q. Are you divorced now?

A. Yes, I am.

Q. When were you divorced?

A. Ten years ago.

Q. Ten years ago?

A. Uh-huh.

Q. Do you have any children?

A. Yes, I have four.

Q. Do your children live in San Diego?

A. Yes, they do.

Q. Do you have other family in San Diego as well?

A. Yes, I do.

Q. And do you have family that lives in the same area that you live in?

A. Yes, they do.

Q. Who are some of those relatives?

A. I have an uncle and a – some cousins that live near by me and my niece.

Q. You've lived in the same house for three and a half years?

A. Yes.

Q. Do you currently have a phone at that –

A. No, I do not.

Q. You have no phone in that house. Have you ever had a phone in that house?

[157] A. Yes, I have.

Q. Do you remember when the service was disconnected on that phone?

A. About seven months ago.

Q. Was the service disconnected before or after you were arrested in this case?

A. It was before.

Q. Do you remember how long before?

A. No, I do not.

Q. I'm not meaning to pry into your personal affairs, but why is it that your phone was disconnected?

A. I was unable to pay it.

Q. Have you ever been convicted of a crime?

A. Yes, I have.

Q. How many times?

A. Once.

Q. When did this happen?

A. Five years ago.

Q. What was the charge you were convicted of?

A. I was under the influence of methamphetamine.

Q. Did you go to jail on that case?

A. For the weekend.

Q. What was the sentence that you received?

A. Probation, I believe, and a rehabilitation completion that I needed to do, which I did.

[158] Q. Did you plead guilty in that case or did you have a trial?

A. I pleaded guilty.

Q. Do you have any other criminal convictions?

A. No besides this one.

Q. I want to ask you some questions about the van that some of the witnesses have testified about in this case. Whose van was that?

A. Mine.

Q. And how long had you owned this van?

A. Well, I got it in June 12, and I registered it on June 17.

Q. You were arrested on July 29?

A. Yes, I was.

Q. And as of the date of your arrest, this van was registered in your name?

A. Yes, it was.

Q. What kind of a van is this?

A. It's a GMC van.

Q. Do you know what year?

A. I believe it was an '84.

Q. Ms. Ohler, how much did you pay for the van?

A. I paid $1200 for it.

Q. Where did you buy this van?

A. I bought it in National City on Division where it was for show; they park It there and they have a for sale sign, you call the number, and the people met with me there.

[159] Q. Tell us what the situation was; did you go to someone's house or did you meet –

A. No.

Q. – where the van was parked?

A. I called their number and they met me at the spot where the van was left so the people can see you.

Q. Did you meet them on the same day that you called about the van?

A. Not the same day. I think I met them about a day or two later. I'm not sure. It wasn't the same day.

Q. When you met these people at the van, did you buy it that very same day?

A. No, I didn't.

Q. How much longer after this occurred – how much time passed until you bought it?

A. Two days, two days later.

Q. And who were the people that you bought it from?

A. It was a Mexican couple, and I did the dealings with the lady, the Mexican lady.

Q. How many times did you meet with them?

A. I met with them a couple of times only.

Q. Where did these meetings take place?

A. Where the van was parked –

Q. Any other place?

A. – in National City on Division Street.

[160] Q. Did you ever meet at any other location regarding this van?

A. No, I didn't.

Q. You've heard some testimony about some DMV documents in this case?

A. Yes.

Q. I'd like to show you what's been admitted into evidence as Government's Exhibit 9. Now, Maria, in Government's Exhibit 9 I've turned to a page that's entitled I believe statement of facts; do you see that?

A. Yes.

Q. And there is a factual statement that is written out regarding the sale of this van?

A. Correct.

Q. Did you write that?

A. No, I didn't.

Q. Do you recall what papers you signed when you purchased the van?

A. Just the one that they had. I signed the back of the pink slip where the names of the two people were on it, but the DMV told me to sign it – when I took all the paperwork, they asked me to take it back.

Q. When you bought this van, did you pay for it in cash?

A. Yes, I did.

Q. What papers did the seller give you?

A. well, when I paid for it, they didn't give me anything, just [161] gave me the pink slip. I went with that to the DMV. I never realized it was written on the back of the paper.

Q. So you gave them $1200, and they gave you the pink slip and the van?

A. Uh-huh.

Q. I'm sorry. You need –

A. Yes.

Q. – to say yes for the record.

A. Yes.

Q. Maria, how long after you paid for the van was it when you went to DMV?

A. That same day.

Q. And did you register the car that same day?

A. On the 17th, yes.

Q. Did you end up going back there later?

A. Yes. I went back because they gave me the papers to give to the people to fill out, and that's what I did. I called the people up and they agreed to meet with me again. I gave them the papers then, the ones that I got, and they filled them out.

Q. How many times did you go to DMV then?

A. Twice.

Q. Was this in a one-week period?

A. No, same day.

Q. How did you contact the people after you went to DMV the first time and you obtained the documents?

[162] A. I called them.

Q. Do you know if the van had a current registration sticker at the time you bought it?

A. No, I didn't notice it.

Q. Do you remember how much you had to pay in registration fees at DMV?

A. $346.

Q. Do you know why it was so much?

A. No, I didn't know then, but when they told me because the people that the names were in the back of the paper, they never went to register it in their name.

Q. Were you told whether the registration had expired?

A. Yes, it was expired.

Q. Was it your understanding that a portion of that $346 was to pay back registration fees?

A. Yes.

Q. Do you know a man named Francisco Gomez?

A. Yes, I do.

Q. Who is Francisco Gomez?

A. An acquaintance of mine, an ex-acquaintance now.

Q. And where did you meet this person?

A. At a Mexican club.

Q. What is this club called?

A. Jackie's Place.

Q. Where is Jackie's Place located?

[163] A. On Main Street in San Diego.

Q. And did you go to Jackie's Place on a regular basis?

A. I used to work there.

Q. And did Francisco also work there?

A. No, he was just a customer there.

Q. When was it that you worked at this club?

A. Two years ago.

Q. And what was your job there?

A. Waitress.

Q. And for how long a period of time did you work there?

A. I worked there for almost a year.

Q. And you met Francisco Gomez while working there?

A. Yes, I did.

Q. You were – do you recall approximately when it was that you met him?

A. No, I do not.

Q. How long ago?

A. Well, I worked there two years ago and I worked for almost a year, so – I still went to dance there, but I wasn't working there. I met him about a year and a half now.

Q. After you stopped working at this club called Jackie's Place, did you maintain a friendship with Francisco Gomez?

A. Yeah, I would run into him there.

Q. Did you ever socialize with him outside of the bar?

A. Yes, we did, a couple of times.

[164] Q. Where would this take place at?

A. At my house.

Q. Was this a friendship or a romantic –

A. A friendship.

Q. How many times was Francisco Gomez at your house?

A. I would say about four times, five times.

Q. I assume you told him where you lived?

A. Yes.

Q. Did you ever give him Irma Fernandez's phone number?

A. Yes, I did.

Q. Did you give that phone number to other friends of yours as well?

A. Yes, I would.

Q. Is there any other person that would receive messages for you other than your niece Irma?

A. No, not that was close enough. My daughter would, but she wasn't close enough to come and bring them to me, so –

Q. Do you know if Francisco Gomez ever called you at Irma Fernandez's house?

A. Yes, I do.

Q. Do you know how many times?

A. Twice.

Q. What was the purpose of the first call?

A. He needed me to pick him up to give him a ride to a friend's house or something like that, and

[165] Q. Where did he need to be picked up at?

A. At Jackie's Place, in front of Jackie's Place.

Q. How did you learn that he had called Irma's house?

A. My niece came.

Q. When she gave you that message, did you pick him up?

A. Yes, I did.

Q. What vehicle were you driving when you picked him up?

A. The van.

Q. Do you know if Francisco Gomez had a car of his own?

A. Not that I know of.

Q. Did you ever allow him to drive your van?

A. Yes, I did.

Q. How many times?

A. Twice.

Q. And you would allow him to take the van without you being with him?

A. I did that twice, but only to run some errands, and he brought it right back.

Q. So for how long a period of time would you let him use the van?

A. How long he used the –

Q. An hour a day?

A. Couple of hours. Then he'd bring it right back.

Q. I want to ask you some questions about the evening of July 28, the night before you were arrested. Do you remember that [166] evening?

A. Yes, I do.

Q. And you were arrested on July 29?

A. Yes, I was.

Q. And what time of day was it when this happened when you were arrested?

A. I was arrested the following day in the morning.

Q. The night before, the night of July 28, do you recall where you were that evening?

A. I was at home. I was at home.

Q. Did you see Francisco Gomez that night?

A. Yes, he showed up at my house.

Q. And do you remember about what time it was when he arrived at your house?

A. He arrived about 7:30 in the evening.

Q. Were you –

A. He was – sorry – he was – he arrived with a 12-pack of beer around that time.

Q. Were you expecting him to come by?

A. No, I wasn't.

Q. Did you mind that he just dropped in on you?

A. No, I didn't mind.

Q. So you allowed him into your house?

A. Yes, I did.

Q. And how long did he stay at your house?

[167] A. He stayed until about before nine in the evening. Then he left.

Q. So he was there for a couple of hours?

A. Yes.

Q. And what happened during the couple of hours that he was at your house?

A. Well, we were drinking. He was already really halfway drunk practically, and he was drinking his beer

pretty fast. And we were just chitchatting over really nothing worthwhile and he seemed like he was in a bad mood and restless and really had no meaning for him being there in the first place, you know, no purpose for him being there; I didn't feel like he was there just visiting me. We continued to talk, and then my cousin showed up.

Q. Who is your cousin?

A. Peter.

Q. What is Peter's last name?

A. Bernal.

Q. And how long was Peter at your house?

A. He was there a few minutes only, 15 minutes.

Q. Did Peter meet Francisco Gomez?

A. Yes, he did.

Q. Did Peter and Francisco Gomez talk?

A. Well, I just introduced them, and as soon as I introduced them, Francisco stepped out of the house. And I offered my [168] cousin a beer and he sat down with me and talked with me and then afterwards he left after he finished his beer.

Q. Did you ask Francisco to step out of the house while you and Peter were talking?

A. No, I didn't.

THE COURT: Ms. Ohler, please let counsel finish his question before you begin your answer. Thank you.

THE WITNESS: Okay.

BY MR. NEAL: Q. Do you know why he stepped out of the house?

A. No, I do not.

Q. When Peter left, was Francisco still at your house?

A. Yes, he was.

Q. Do you remember what happened when Francisco left your house?

A. Well, after my cousin left, he came back in the house and he went directly to where my car keys are at and he grabbed the keys and he left in the van. And I thought he was going to the store because there was no more beer for him.

Q. Did he ask you if he could take your van?

A. No, he didn't.

Q. Did he tell you where he was going?

A. No, he didn't.

Q. What did you do while he was gone?

A. Basically nothing. I just sat there, watched some TV, and [169] waited for him to come back.

Q. Did he ever come back?

A. No, he didn't.

Q. When was the next time that you learned something about your van?

A. When my niece came to tell me about the van, and that was late at night already.

Q. Was this the same night?

A. Yes, it was.

Q. Do you remember approximately what time it was?

A. No, I do not because I was already – I was falling asleep on the sofa. It was already late.

Q. When your niece arrived at your house, were you upset about Francisco being gone?

A. Well, when she arrived, I thought it was him. When the doorbell rang, I jumped up, I opened the door quickly, and I – I go what – I go what's wrong, and she said nothing, I just came to give you a message, and she told me that he asked her to come and tell me that my van was across the border, if I wanted it to go pick it up.

Q. What was your reaction to learning this?

A. I was upset. I was very upset because, you know, I didn't give him permission, for one, at all take that van, for him to take it all the way to Mexico; it didn't even have insurance, so –

[170] Q. Did you have any idea how you were going to get your van back?

A. The only idea that came to mind was my niece, and that's when I asked her.

Q. Did she agree to take you to the border?

A. Yes, she did.

Q. When was she going to take you to the border?

A. She told me in the morning after she dropped off her boyfriend.

Q. Did she pick you up the next morning?

A. Yes, she did.

Q. About what time was it when that occurred?

A. I remember it was around 6:30, 6:40.

Q. Were you ready to go when she arrived?

A. Yes, I was. I just didn't have my makeup on.

Q. Did anyone go with you to the border?

A. No. With me personally?

Q. In the car with you and your niece.

A. My nephew, my niece and her son.

Q. Where did your niece take you to?

A. She dropped me off in the last – the last exit that you can take before you get to the border.

Q. And what did you do from there?

A. I walked to TJ.

Q. Did you know where your van was parked?

[171] A. No. I had to look for it in the parking lots that were there.

Q. Did you find it?

A. Yes, I did.

Q. How long did it take you to find it?

A. Not very long because I looked in the first parking lot which is visible, and then continued to walk. I walked in all the way. I would say a few minutes.

Q. Had Francisco Gomez left the keys in the van?

A. No. I had my spare.

Q. But when you got into the van, were there – was there another set of keys there?

A. No, my keys were not in the van.

Q. Once you found your van, what did you do after that?

A. I bought myself a cup of coffee and a doughnut, and I exited the parking lot. And I almost went the wrong way in the turn I made – I was going to make a U-turn. That's not allowed, so I didn't know where I was going to or where to go to until an officer, Mexican police officer, stopped me and he told me what was I doing or where was I going. I told him I needed to get to the border, and he directed me to the border.

Q. Did you end up finding your way to the port of entry?

A. Yes, I did.

Q. And when you got up close to the port of entry, was there a line at the border?

[172] A. There was a couple of cars; there was about eight or nine cars ahead of me.

Q. Did you do anything while you were waiting in line?

A. Yes. I started applying my makeup.

Q. And what were you using to do that?

A. Well, I wasn't using the rearview mirror; I was using a compact.

Q. Something that was in your purse?

A. Yes.

Q. Do you recall an inspector approaching your van to ask you some questions?

A. I recall him coming up to the window.

Q. And when he got up close to your van, what were you doing then?

A. I was still applying my makeup.

Q. Do you remember what questions he asked you?

A. If the van was mine.

Q. What did you tell him?

A. And I said yes. And then he asked me for my driver's license and registration.

Q. Did you have a driver's license?

A. Yeah. I gave it to him.

Q. Sorry?

A. Yes. I'm sorry.

Q. And did you also provide him with the registration?

[173] A. Yes, I did.

Q. Approximately how many questions did he ask you?

A. Well, he asked me if he – he can take a look in the back of my van, and I told him go ahead, you know, and so he was already with other people, other guys with him, other immigration officers and the dogs, and he opened the back and I don't know what they were doing in the back. I continued to apply my makeup.

Q. Well, at some point when he first approached the van, was he alongside the driver's side window?

A. Yes.

Q. And he stood there and asked you a few questions?

A. Uh-huh.

Q. What did you do while he was asking you these questions?

A. Well, I answered him the questions.

Q. Did you continue applying your makeup?

A. After he was done with the questions, I continued to apply my makeup.

Q. Were you annoyed or upset that you were being asked these questions?

A. Well, I wasn't annoyed at him, I was just annoyed that I had to go and get my van in the way I had to go get it, you know, when I had no business going after my van.

Q. Maria, do you remember at some point being asked to turn off the van?

[174] A. Yes, I do.

Q. And what was your reaction to this request?

A. Well, I was surprised, but I did it anyway.

Q. And after you turned off the van, were you at some point requested to get out of the van?

A. To get – gather my things and to step out of the van.

Q. Did you do this?

A. Yes. I was gathering my things when I was pulled off the van and thrown against the van and handcuffed.

Q. And what was your reaction to this?

A. Well, I was startled, but I didn't want to say anything more.

Q. Did you know whether you were being arrested?

A. I didn't ask him that until he escorted me past the border and into the building. That's when I asked him am I being arrested.

Q. Did you know that there was marijuana in this van?

A. No, I didn't.

Q. Were you trying to bring marijuana across the border?

A. No, I wasn't.

MR. NEAL: Nothing further.

THE COURT: Cross-examination?

MR. KELLY: May I have just one moment?

THE COURT: Certainly.

[175] Cross-Examination

BY MR. KELLY: Q. Good afternoon, ma'am.

A. Good afternoon.

Q. I'm not sure I heard clearly, ma'am. You bought – from whom did you buy the van?

A. A Mexican couple.

Q. A Mexican couple. And where did you meet them?

A. Met them on Division where the van was with the for sale sign.

Q. I'm sorry. The van was standing outside?

A. No, the van was parked on Division Street in National City with a for sale sign.

Q. Was there a phone number on –

A. There was.

Q. You called that phone number?

A. I did.

Q. Was it parked in front of somebody's house?

A. No, it was parked on the side of the street.

Q. But they met you on that day?

A. No, they met me two days later.

Q. What were they asking for it?

A. What do you mean?

Q. How much money did they want for the van?

A. They wanted $1200 for it.

Q. So you paid them exactly what they were asking?

[176] A. Yes, I did.

Q. Then you went down to DMV that day?

A. Yes, I did.

Q. That very day?

A. Not the day I bought it. I bought it on the 12th, I went down on the 17th.

Q. Okay. Which is it, you just –

A. I bought it on the 12th and I went to the DMV on the 17th.

Q. And you paid $346 in fees?

A. Yes.

Q. Did you pay cash for those fees?

A. Yes, I did.

Q. Did you go to DMV directly personally?

A. Yes, personally, yes.

Q. Personally. And you paid for the van in cash?

A. Yes, I did.

Q. So the total you paid was $1546?

A. Total.

Q. Total. Ma'am, your phone was disconnected on – in July sometime?

A. Correct.

Q. And that was because you couldn't pay?

A. The reason I couldn't pay is because I did save up for the van.

Q. By whom are you employed, ma'am?

[177] A. I'm not employed right now.

Q. Ma'am, Francisco Gomez – you said that you met him two years ago; is that right?

A. Yes.

Q. And that was at Jackie's Place?

A. Correct.

Q. And you developed a friendship with him?

A. An acquaintance.

Q. Where does Francisco Gomez live?

A. I don't know.

Q. What's his phone number?

A. I don't know his phone number either.

Q. Where does he work?

A. I believe he works – somewhat of a mechanic here and there. I don't know where exactly.

Q. Do you know any of Francisco Gomez's friends?

A. I met one acquaintance of his.

Q. Who is that?

A. They called him Haro (phonetic). His name is Jose, but that's it.

Q. You developed enough of a friendship with Francisco to have him drop over to your house you said four to five times; is that right?

A. Not all in one time. In the period of time, yes.

Q. Right, four to five times?

[178] A. Uh-huh.

Q. Did he ever have you over to his house?

A. No.

Q. Did he ever ask you over –

A. No, he didn't.

Q. – to his house. And you never knew where he lived?

A. No, I did not.

Q. And you developed enough of a relationship to where you lent your car to him?

A. Yes.

Q. Ma'am, you own another vehicle, don't you?

A. Yes, I do.

Q. What is that?

A. It's a '89 Mustang.

Q. On occasion Francisco would borrow your van to run some errands?

A. He did it twice.

Q. Did you hand him the keys or did he take the keys?

A. Yes, I did.

Q. He showed up at around 7:30 one night with a 12-pack unexpectedly; is that right?

A. Yes, he did.

Q. And he was there for a couple of hours?

A. Yes, he was.

Q. With no particular purpose?

[179] A. None that I know of.

Q. What was your response when he took your keys and walked outside?

A. Well, in the way that he did it – he did it like in a harsh way. He was upset about something and he was already buzzed and we were out of beer. He didn't say anything. I just didn't say nothing to him. I just figured he's going to go get some beer and come back.

Q. Was he upset with you?

A. No.

Q. So he grabbed the keys and just left?

A. Yes, he did.

Q. And you were upset?

A. He was upset. I just didn't know why he was upset.

Q. And then you fell asleep on the couch?

A. Not right away. I just waited for him.

Q. Now, this occasion in which you went down to pick up the car, did you know exactly where you were going to pick it up?

A. All I knew it was – that he had told my niece it's across the border. So there's only two parking lots across the border, so I just went to look.

Q. Did your niece say what kind of parking lot it was, restaurant parking lot or –

A. No, she just said across the border.

Q. – a gasoline parking lot or –

[180] A. No.

Q. – a pay parking lot? It could have been any of those?

A. A what?

Q. A pay lot kind of parking lot. Could it have been any of those?

A. I don't know. It was just a parking lot. There was a lot of other cars parked there. I guess there's a pay parking lot.

Q. Did you know which lot?

A. No, I didn't.

Q. When you found your van, the keys were not in it?

A. No, they weren't.

Q. Were you pretty upset?

A. I was upset, but I was happy I found my van.

Q. How were you thinking you were going to drive that van home?

A. I had a spare keys.

Q. But you went and got coffee and a doughnut?

A. When you enter Tijuana, they got a lot of little stands where you can buy tacos, food, and they had one right there in the parking lot, which I just purchased a cup of coffee and a doughnut.

Q. You waited there for awhile?

A. No. As soon as I purchased it, I got in my van and I drove off.

Q. And then when you arrived at the port of entry, you've testified that when inspector – the first inspector came to [181] your window, they had the dog and some other guys around as well?

A. There was already a lot of them around my van.

Q. That was as he initially approached you?

A. Excuse me?

Q. That was as he initially approached you?

A. I didn't even see him coming to me. I already saw him at the window. I saw everybody else around it. I didn't think nothing of it.

Q. Did you see the dog?

A. I saw the person had a dog with him.

Q. Ma'am, isn't it true that when Inspector Merriam asked you who owned the van, you said I bought it from a lady in San Diego on June 17?

MR. NEAL: Objection, your Honor; that misstates the testimony.

THE COURT: Overruled. You may answer.

THE WITNESS: No, I did not say that.

BY MR. KELLY: Q. Did you say that you bought it from a lady in San Diego?

A. I did say that but not when he asked me the question.

Q. Ma'am, I'd ask you to refer to Government's Exhibit No. 9, which I think is in front of you; do you see that?

A. What page did you want me to –

Q. I'd ask you to look at the statement to record ownership; [182] that would be about the fourth page. Do you see that?

A. Yes.

Q. Is that your handwriting?

A. This is my writing that I filled out at the DMV.

Q. You filled that out at DMV?

A. Yes, I did.

Q. I ask you to turn to the next page – the next page; do you see that?

A. Two pages afterwards?

Q. Right, the application for transfer by new owner.

A. Yes.

Q. Do you see that page?

A. Yes, I do.

Q. Is that your signature there?

A. Yes, it is. And I also signed this at the DMV.

Q. Now, do you see where the registered owner is listed as Jacob McManus or Carla Williams?

A. Yes, I do.

Q. Do you know those people?

A. I would assume it's the couple I dealt with.

Q. You indicated earlier that it was a Mexican couple, right?

A. Well, I don't – to me they're Mexican. I don't know if that – if their last name goes with what they look like.

Q. I'd ask you to turn to the third to last page if you would, the bill of sale; do you see that?

[183] A. Yes.

Q. Is that your handwriting at the top?

A. At the top it is. I filled out where Maria Suzuki, and the Cottonwood address is where I filled out.

Q. I'm sorry. So you filled out your name –

A. Yes.

Q. – in print there?

A. Uh-huh.

Q. So that line actually reads Maria Suzuki Ohler?

A. Yes.

Q. Not Ottler?

A. No, Ohler.

Q. Ask you to look at the following page, statement of facts; do you see that?

A. Yes, I do.

Q. Is that your handwriting?

A. No, it isn't.

Q. Did you write that?

A. No, I didn't.

Q. Did you buy the GMC van from Linda McColley?

A. No, I didn't.

Q. Do you know the names of the people from whom you bought it?

A. I just saw the name Linda, but I didn't know how to pronounce her last name; I just know it was Linda.

Q. Was Linda one of the people from whom you bought it?

[184] A. The person that came to testify for you is not the lady I met with. If that's Linda, I don't know her. But I just saw the registration. The name I saw on it was Linda, not the back part.

Q. You did not buy it from Linda McColley?

A. No, I didn't.

Q. Now, you brought all of this registration paperwork to DMV when you bought it, did you not?

A. When I went with the pink slip, they gave me all the paperwork that needed to get filled out because – the people that was in back of the pink slip never registered it, so I needed them – they needed me to take these papers to the person who sold me the van to get the proper information, and that's what I did.

Q. You took it to which person?

A. To the people that sold me the van.

Q. Okay. And they –

A. To get the proper information, which that's what I did.

Q. So you went to see Jacob McManus and Carla Williams?

A. No. I called the number that was on the van for the people I dealt with. I gave them the paperwork and they did it and they gave it back to me.

Q. So then Jacob McManus and Carla Williams, they live in the Division Street area?

A. No, they did not live on Division Street. The van was on [185] Division Street with the phone number which I used to call them.

MR. KELLY: If I might have a moment, your Honor.

THE COURT: Certainly.

BY MR. KELLY: Q. Ma'am, did you also – you told Inspector Mitch Merriam that you had spent the night in Tijuana, didn't you?

A. No, I did not.

Q. Ma'am, the conviction to which defense counsel earlier referred on April – April 20, 1993, that was a felony conviction for possession of methamphetamine, wasn't it?

A. Yes.

MR. KELLY: No further questions, your Honor.

THE COURT: Mr. Neal –

MR. NEAL: Just briefly, your Honor.

THE COURT: – redirect?

MR. NEAL: Thank you.

Redirect Examination

BY MR. NEAL: Q. Was your conviction for personal use or for dealing?

A. Yes, personal use.

Q. You said when you went to the DMV the first time, they gave you some papers that needed to be filled out?

A. Correct.

Q. You contacted the people you bought the van from after that?

A. Yes.

[186] Q. Was it the man or the woman that filled out the papers that you gave them?

A. The woman is who I did the deal with.

Q. Did you ever ask either the man or the woman for any photo identification?

A. No, I didn't.

Q. Do you know if the name that they put on some of these documents listing the person selling you the van – do you know if that was their true name?

A. No, I don't.

Q. Did it matter to you at the time or did you have any reason to think it might not be their true name?

A. It didn't matter to me.

Q. When the first customs inspector asked you some questions when you were in the line, do you remember being asked if this was your van?

A. Yes, I do.

Q. And do you recall whether you said yes, it is, or whether you blurted out I bought it from a lady in San Diego?

A. No. I said yes, it is.

Q. This van was parked on Division Street?

A. Yes.

Q. Is this a street where vehicles are commonly parked that are for sale?

A. Yes, it is.

[187] Q. When Francisco Gomez left your house that evening and grabbed the keys, did he appear to be angry?

A. He appeared to be upset and restless, like I said, but I didn't know why.

Q. Had he said anything to you to indicate why he was angry?

A. No, he didn't.

Q. You were asked if you also own another car?

A. Yes, I do.

Q. And what is the other car that you own?

A. An '89 Mustang.

Q. Since you had an '89 Mustang, why did you buy this van?

A. Because I wanted to take my kids up to San Francisco, and I wanted to drive so we can see the scenery.

Q. Was this Mustang operating?

A. Not at the time; it needed a clutch.

Q. At the time you bought the van, did you have any car that you could drive around?

A. Well, if I asked a ride from my niece. I usually would walk anywhere I needed to go.

Q. How long had the Mustang been broken down at the time you bought the van?

A. It had been about two months prior to. I didn't want to drive it anymore because the clutch was really bad.

Q. Why would you pay $1200 plus $346 in DMV registration in order to buy this van when you couldn't pay your phone bill?

[188] A. Because, like I said before, I saved up enough to buy another car, which I wanted a van so me and the kids could go to San Francisco.

Q. Did you feel that it was more important for you to have a van or to have your phone turned on?

A. To have the van.

Q. Was it a van specifically that you wanted or just a car?

A. Yes, a van.

MR. NEAL: Just one moment, please, your Honor.

BY MR. NEAL: Q. What would have been the purpose of a trip to San Francisco?

A. To visit my baby sister over there.

MR. NEAL: I have nothing further.

THE COURT: Mr. Kelly, any further cross-examination?

MR. KELLY: Just one quick question, your Honor.

Recross-Examination

BY MR. KELLY: Q. Ma'am, how long did you plan to stay in San Francisco?

A. Just for a couple of weeks.

MR. KELLY: Nothing further, your Honor.

THE COURT: Anything further, Mr. Neal?

MR. NEAL: No, your Honor.

THE COURT: Thank you, Ms. Ohler. You may step down.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

vs

MARIA SUZUKI OHLER (1)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

CRIMINAL CASE NUMBER 97CR2278-JM

(Filed Apr. 27, 1998)

GARY BURCHAM, FEDERAL DEFENDERS
Defendant's Attorney

THE DEFENDANT

X was found guilty on counts One & Two of the Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count(s)
21 USC 952, 960	Importation of Marijuana (Felony)	1
21 USC 841(a)(1)	Possession of Marijuana with Intent to Distribute	2

The defendant is sentenced as provided in pages 2 through 4 of this Judgment.

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 on each count for a

total of $200.00, payable forthwith; the Court also finds that the defendant cannot pay a fine.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY (30) MONTHS AS TO COUNTS 1 & 2 CONCURRENTLY.

X The court makes the following recommendations to the Bureau of Prisons:

This court recommends that this defendant be designated to an institution as close to the Dublin, CA area as possible so she can maintain a relationship with her children.

_ The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS AS TO COUNTS 1 & 2 CONCURRENTLY.

The defendant shall report to the probation office in the district to which the defendant is released within 72

hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

__ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

__ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in this judgment.

The defendant shall comply with the standard conditions that have adopted by this court on the attached page. The defendant shall comply with the special conditions (listed below).

SPECIAL CONDITIONS OF SUPERVISION

X Not possess firearms, explosive devices, or other dangerous weapons.

X Submit to search of person, property, residence, abode or vehicle at a reasonable time and in a reasonable manner by the Probation Officer or the probation officer's designee.

X Participate in a program of drug or alcohol abuse treatment, including urinalysis testing and counseling as directed by the probation officer.

X Participate in a program of mental health treatment as directed by the probation officer, take all medications as prescribed by a psychiatrist/physician, and not discontinue any medication without permission. The Court authorizes the release of the Presentence Report and available psychological evaluations to the mental health provider, as approved by the probation officer.

X Report all vehicles owned or operated or in which you have an interest to the probation officer.

X Not enter the Republic of Mexico without written permission of the court.

X Resolve all outstanding warrants within 60 days.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distribute [sic], or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

APRIL 23, 1998
Date of Imposition of Sentence

/s/ Illegible
Signature of Judicial Officer
JEFFREY T. MILLER
United States District Judge
Name and Title of Judicial Officer

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARIA SUZUKI OHLER, *Defendant-Appellant.*	No. 98-50282 D.C. No. CR-97-02278-JTM OPINION

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted March 2, 1999[1]
Pasadena, California

Filed March 9, 1999

Before: Alfred T. Goodwin, Melvin Brunetti, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Brunetti

BRUNETTI, Circuit Judge:

Maria Suzuki Ohler ("Ohler") appeals from a jury verdict finding her guilty of one count of importation of marijuana, in violation of 21 U.S.C. §§ 952 and 960, and one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Ohler contends that the district court erred when it concluded that

evidence of her 1993 conviction for possession of methamphetamine was admissible under Rule 609(a)(1) of the Federal Rules of Evidence and granted the government's motion in limine. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Facts and Proceedings Below

Ohler attempted to enter the United States from Mexico through the San Ysidro, California, Port of Entry on July 29, 1997. As Ohler, the driver and sole occupant of a 1984 GMC van, passed through the port of entry, a customs inspector noticed that someone had tampered with one of the van's interior panels. Customs inspectors searched the van and discovered over eighty-one pounds of marijuana. Ohler was arrested and subsequently indicted on August 6, 1997, for importation of marijuana and possession of marijuana with intent to distribute.

Because Ohler had been previously convicted on February 13, 1993, for possession of methamphetamine, the government filed motions in limine asking the district court to admit Ohler's prior felony convictions as character evidence under Rule 404(b) and impeachment evidence under Rule 609(a)(1). The district court denied the government's motion in limine to admit Ohler's prior conviction as character evidence under Rule 404(b) and reserved ruling on whether the prior conviction was admissible for impeachment purposes under Rule 609(a)(1). On the morning of the first day of Ohler's trial, this district court concluded that, if Ohler were to testify

on her own behalf, evidence of her past criminal conviction would be admissible under Rule 609(a)(1) to impeach her credibility.

After the government concluded its case-in-chief, Ohler testified in her own defense and denied that she had any knowledge of the marijuana discovered in the van. Specifically, she testified that the van had been taken without her permission the night before her arrest, that she had gone to Mexico simply to retrieve the van, and that she was arrested when she attempted to return to the United States. During her direct examination, Ohler admitted that she had been previously convicted of possession of methamphetamine in 1993. On cross-examination, the government asked Ohler if her prior possession conviction was a felony and Ohler answered affirmatively. Ohler then explained on redirect examination that her prior drug possession conviction was for possession of a personal use quantity rather than for possession of a distribution quantity.

At the conclusion of Ohler's two day trial, the jury found her guilty of importation of marijuana and possession of marijuana with intent to distribute. The district court sentenced Ohler to 30 months imprisonment and three years of supervised release and assessed a $200 penalty.

II. Discussion

This Court has held that, when a criminal defendant introduces evidence of his prior conviction during his direct examination, the criminal defendant waives the right to appeal the district court's in limine ruling that

the prior conviction was admissible under Rule 609(a)(1). *See United States v. Williams*, 939 F.2d 721, 725 (9th Cir.1991); *Shorter v. United States*, 412 F.2d 428, 431 (9th Cir.1969); *see also United States v. Bryan*, 534 F.2d 205, 206 (9th Cir.1976) (no reversible error even if evidence of prior conviction is not admissible when defendant introduces prior conviction into evidence). Ohler attempts to circumvent the express holding of *Williams* by arguing that *Williams* is no longer applicable after the 1990 amendments to Rule 609(a)(1). Ohler's argument is without merit.

Before Rule 609 was amended in 1990, it read:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Fed.R.Evid. 609 (amended 1990).

In 1990, the statutory limitation that a witness's prior conviction could only be introduced during cross examination to impeach the witness's testimony was removed from Rule 609. The amended and current version of Rule 609(a) reads:

> (a) General Rule. For purposes of attacking the credibility of a witness,

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

Fed.R.Evid. 609(a).

The Advisory Committee Note to Rule 609 explains why the limitation that a defendant's prior conviction could only be elicited during cross examination was removed from Rule 609. The Advisory Committee Note states:

> The amendment to Rule 609(a) makes two changes to the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to 'remove the sting' of the impeachment.

Fed.R.Evid. 609 advisory committee note. The advisory committee note demonstrates that, even prior to the 1990 amendments to Rule 609, a criminal defendant could introduce evidence of his prior convictions during his direct examination because most courts found the cross-

examination limitation inapplicable. *See, e.g., United States v. Bad Cob*, 560 F.2d 877, 883 (8th Cir.1977); *United States v. Dixon*, 547 F.2d 1079, 1082 n.2 (9th Cir.1976).

Ohler contends that "as Rule 609(a)(1) now reads, there is no limitation as to who may introduce evidence of a prior conviction under Rule 609; if the defendant wishes to 'remove the sting' of Rule 609 evidence by bringing the conviction out on direct examination, such a strategy is statutorily sanctioned." Ohler, therefore, argues that, because the strategy of "removing the sting" is now statutorily sanctioned by Rule 609, a criminal defendant does not waive the right to appeal an in limine ruling that a prior conviction is admissible when the defendant introduces evidence of his prior conviction during his direct examination. Ohler's argument is meritless because even prior to the 1990 amendments to Rule 609 and this Court's decision in *Williams* a criminal defendant in this circuit could "remove the sting" of Rule 609 evidence by introducing evidence of his prior convictions during his direct examination.

This Court, in 1976, examined the text of former Rule 609 and recognized that the first sentence explicitly stated that evidence of a prior conviction could only be admitted if elicited from the witness or established by public record during cross-examination. *See Dixon*, 547 F.2d at 1082 n. 2. Despite recognizing the cross-examination limitation in former Rule 609, this Court declared that "[i]t seems clear from the legislative history that on direct examination, *a party may elicit the evidence of a prior conviction from his own witness*; if the witness has forgotten or denies the existence of the conviction, the party may then introduce evidence of the conviction by public record,

even though this does not take place on cross-examination." Id. (emphasis added). The Court reasoned that the purpose of the cross-examination limitation in former Rule 609 was to insure that a prior conviction was not used to impeach a person who did not testify and that this purpose was not frustrated when a party elicited evidence of a prior conviction from his own witness during direct examination. *Id.*

Assuming, without deciding, that Ohler is correct in stating that Rule 609 now statutorily sanctions the "remove the sting" strategy that criminal defendants often employ, the 1990 amendments to Rule 609 do not reflect a true change in the law because, since at least this Court's decision in *Dixon*, a criminal defendant in this circuit has been allowed to introduce evidence of his prior criminal convictions during his direct examination. Therefore, when *Williams* was decided in 1991, a criminal defendant was explicitly allowed, despite the language of former Rule 609, to introduce evidence of his prior convictions during his direct examination. The 1990 amendments to Rule 609 do not affect the validity and/or applicability of the *Williams* decision because the "remove the sting" strategy has long been sanctioned by this Court and the 1990 amendments to Rule 609 only codify the law as it existed when *Williams* was decided.

This Court's decisions in *Dixon* and *Williams* do not stand alone. Other circuit courts have long recognized that a criminal defendant can introduce evidence of his prior convictions during his direct examination, *see, e.g., Bad Cob*, 560 F.2d at 883 ("The introduction by a witness himself, on his direct, of a prior conviction is a common

trial tactic, recommended by textwriters on trial practice."), and have also held that a criminal defendant waives the right to appeal an in limine ruling that a prior conviction is admissible when the defendant introduces evidence of his prior conviction during his direct examination. *See, e.g., United States v. Gaitan-Acevedo*, 148 F.3d 577, 591-92 (6th Cir.), *cert. denied, Crehore v. United States*, 119 S.Ct. 256, *and rehearing denied*, 119 S.Ct. 457 (1998); *Gill v. Thomas*, 83 F.3d 537, 541 (1st Cir.1996); *United States v. DePriest*, 6 F.3d 1201, 1209 (7th Cir.1993); *United States v. Vega*, 776 F.2d 791, 792 (8th Cir.1985). Furthermore, no circuit court has found it necessary to reexamine the waiver issue in light of the 1990 amendments of Rule 609. *See, e.g., United States v. Fisher*, 106 F.3d 622, 629 (5th Cir.1997) (defendant does not waive right to appeal); *United States v. Smiley*, 997 F.2d 475, 479-80 (8th Cir.1993) (defendant waives right to appeal); *United States v. Brown*, 956 F.2d 782, 787 (8th Cir.1992) (same). These decisions reinforce the position of the advisory committee that the 1990 amendments to Rule 609 only removed a limitation that most courts already found inapplicable and support the conclusion that this Court's decision in *Williams* has not been disturbed by the 1990 amendments to Rule 609.

Ohler's reliance on the Fifth Circuit's decision in *Fisher* to support the argument that the 1990 amendments to Rule 609 represent a fundamental change in the law that affects this Court's decision in *Williams* is misplaced. The *Fisher* decision does not address the 1990 amendments to Rule 609. *See Fisher*, 106 F.3d at 629. It simply follows Fifth Circuit precedent that holds that a party does not waive the right to appeal an in limine ruling that a prior conviction is admissible when the defendant

introduces evidence of his prior conviction during his direct examination. *Id.* (citing *Reyes v. Missouri Pac. R.R.*, 589 F.2d 791 (5th Cir.1979)). Thus, the *Fisher* decision does not rely on the 1990 amendments to Rule 609 but relies on precedent that pre-dates 1990 to conclude that a defendant does not waive the right to appeal a district court's in limine ruling when the defendant introduces evidence of his prior convictions during his direct examination. *See id.* Just as the law of the Fifth Circuit has not been affected by the 1990 amendments to Rule 609, the law of this circuit and the *Williams* decision have not been altered by the 1990 amendments to Rule 609.

Ohler argues that even if *Williams* is still good law, this case is distinguishable from *Williams* because the government in this case affirmatively moved to introduce the prior conviction. This argument is wholly without merit and disingenuous. This case and *Williams* are indistinguishable. In *Williams*, "[t]he district court ruled *in limine* that the prosecution could admit into evidence for impeachment purposes under Rule 609(a)(1) Williams's prior state conviction for possession of marijuana for sale." *Williams*, 939 F.2d at 723. Here, Ohler faced the exact same situation as the defendant in *Williams* – an adverse in limine ruling allowing the introduction of a prior conviction for impeachment purposes – and she, like the defendant in *Williams*, decided to introduce evidence of her prior conviction during her direct examination to "remove the sting" of the prior conviction. In so doing, Ohler waived her right to appeal the district court's in limine ruling that her prior conviction was admissible under Rule 609(a)(1). *Williams*, 939 F.2d at 725.

Because Ohler waived her right to appeal the district court's in limine ruling, we need not decide whether the district court erred when it determined that Ohler's prior conviction for possession of methamphetamine was admissible for impeachment purposes under Rule 609(a)(1) of the Federal Rules Evidence.

AFFIRMED.

Supreme Court of the United States

No. 98-9828

Maria Suzuki Ohler,

Petitioner,

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 18, 1999